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SUPREME COURT U.S.

NO. 82 6840

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

MICHAEL P. JAMES — PETITIONER

VS.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

COMMONWEALTH OF KENTUCKY — RESPONDENT

* * * * *

C. THOMAS HECTUS
GITTLEMAN & BARBER
635 West Main Street
Louisville, Kentucky 40202
(502) 585-2100

C. Thomas Hectus
COUNSEL FOR PETITIONER

May 27, 1983

QUESTION PRESENTED FOR REVIEW

IS IT A DENIAL OF A CRIMINAL DEFENDANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS AGAINST COMPULSORY SELF-INCRIMINATION AND TO DUE PROCESS OF LAW WHERE A STATE TRIAL COURT DENIES A TIMELY REQUEST FOR AN "ADMONITION" DIRECTING THE JURY THAT NO ADVERSE INFERENCE MAY BE DRAWN FROM THE DEFENDANT'S FAILURE TO TESTIFY, WHERE AN "ADMONITION" IS THE FUNCTIONAL EQUIVALENT OF THE "INSTRUCTION" MANDATED BY THIS COURT IN CARTER VS. KENTUCKY?

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Petitioner, Michael P. James, respectfull prays that a Writ of Certiorari issue to review the opinion of the Supreme Court of Kentucky entered on March 30, 1983.

OPINION BELOW

The opinion of the Supreme Court of Kentucky was rendered on March 30, 1983, and is not to be published. [Appendix, hereinafter A., pp. 1-5].

JURISDICTION

The opinion of the Supreme Court of Kentucky was entered on March 30, 1983. No rehearing was sought. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which states in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

The Fourteenth Amendment to the United States Constitution, which states in pertinent part:

> . . . nor shall any State deprive any person of liberty . . . without due process of law. . . .

STATEMENT OF THE CASE

Michael P. James, (hereinafter, petitioner) was indicted by the September, 1981 term of the Franklin County (Kentucky) Grand Jury, and charged with the offenses of burglary in the second degree; rape in the first degree; and, receiving stolen property over $100.00. [Transcript of Record, hereinafter T.R., p. 1]. Further, petitioner was charged with being a persistent felony offender in the first degree. [T.R., p. 2].

At a suppression hearing held on on August 31, 1981, Detective Claude Owen of the Kentucky State Police testified that he received a call from the Frankfort State Police Post, reporting that there had been a rape, and that he should meet the victim at King's Daughters Hospital in Frankfort. [Transcript of Evidence, hereinafter T.E., Vol. I, p. 7]. At the hospital, he

interviewed Donna Richardson, who reported that she "had been raped by a black male, extremely tall, and that he was her next door neighbor and his first name was Mike." [Id]. After ascertaining petitioner's last name,[1/] Detective Owen then obtained an arrest warrant for petitioner. Detective Owen testified that he and other officers went into petitioner's residence on East Main Street in Frankfort, where petitioner's wife told them that he was at Kentucky State University coaching a basketball game. [T.E. Vol. I, p. 8]. The officers later located petitioner at Kentucky State, where he was placed under arrest. [Id]. At that time, Detective Owen seized a blue gym bag from petitioner. [T.E. Vol. I, p. 9]. The officers returned to the police station with petitioner, during which time petitioner was asked if the police could search his apartment; the police were advised that they could not. [T.E. Vol. I, p. 10]. Owen testified, however, that petitioner's wife was at the police station, and that she consented to the search of the apartment. [Id]. Owen also testified that a search warrant was obtained from Judge Crittenden while they were at the police station. [Id].

Det. Robert Courtney of the Frankfort police testified that while they were at petitioner's house executing the search warrant, Courtney went outside to the police cruiser to get some evidence bags. [T.E., p. 33]. At this time, Courtney said he slid his hand under the gym bag, and felt what appeared to be a gun. [T.E. Vol. I, p. 33]. He then opened the bag and discovered the gun. [Id]. He took the bag inside and showed the weapon to Detectives Boetcher and Owen. [Id].

After taking the suppression issues under submission, the motion was overruled. [T.R., p. 55].

Trial commenced on January 18, 1982. The first witness for the Commonwealth was Donna K. Richardson. [T.E. Vol. II, p. 62]. Ms. Richardson testified that on April 23, 1980, she

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1/ Apparently there had been a fire at petitioner's address at some point previous to this incident; a Detective Boetcher found petitioner's last name from records in the fire department. [T.E., Vol. I, p. 7].

returned to her home, when she noticed that the light was out on the front porch. [T.E. Vol. II, p. 63]. The light had been unscrewed from the socket, so that when it was screwed back in, the light came back on. [Id]. Also, her door was ajar. [Id]. After entering the house, she found that her pistol had been stolen from under her pillow. [Id]. She then identified Commonwealth's Exhibit No.1 (a pistol and a box) as the pistol and box which had been stolen from her home during the burglary. [Id].

Ms. Richardson related that subsequently, on May 1, 1981, she found the glass out of her screen door in the kitchen, and found that the locks were undone. [T.E. Vol. II, p. 64]. Nothing was missing, although the pillows on her bed had been messed up. [Id].

Ms. Richardson said that on May 6, 1981, she went home from work for lunch. [T.E., p. 65]. While she was at home, petitioner came to her apartment and asked to use the phone to call a doctor, saying his wife was sick. [Id]. As she started to dial a number of her own doctor, petitioner grabbed her mouth with his hand, and told her to hang up the phone. [T.E., p. 66]. She stated that petitioner told her to do what he said, or he would kill her. [Id]. She said that petitioner attempted to shove the front door closed and the gun went off into the floor. [T.E., pp. 66-67]. According to Ms. Richardson, petitioner took her to the bedroom, where he tied her hands behind her back and gagged her mouth. [T.E. Vol. II, p.. 67]. Ms. Richardson stated that petitioner then told her they were going to go to his house; he allegedly told her not to try anything or he would kill her. [T.E. Vol. II, p. 68].

Ms. Richardson stated that after getting to petitioner's house, he told her to take her clothes off. [T.E. Vol. II, p. 69]. Petitioner allegedly got a towel, layed it across the bed, and then engaged in sexual intercourse with her. [Id]. According to Ms. Richardson, petitioner then allowed her to wash up, and then allowed her to leave after she promised that she would not tell anyone. [T.E. Vol. II, p. 70]. Also, before

leaving, she was able to secure from petitioner the return of her purse, which contained a second gun. [Id].

After she was released, Ms. Richardson returned to work. [T.E. Vol. II, p. 72]. Because she was frightened, she did not call the police until later that evening. [T.E. Vol. II, p. 72]. After the police were called, Ms. Richardson went to King's Daughters Memorial Hospital in Frankfort. [Id]. Ms. Richardson identified two cloth strips which had been seized from the gym bag appeared to be the strips that were used to tie and gag her. [T.E. Vo. II, p. 73].

The next witness for the Commonwealth was Scott Clark. [T.E. Vol. III, p. 4]. Mr. Clark is an officer with the Frankfort Police Department who investigated the break-in at Donna Richardson's home on May 1, 1981. [T.E. Vol. III, pp. 5-6]. Officer Clark stated that he found the windowpane from the rear storm door beneath the porch in some bushes. [T.E. Vol. III, p. 6]. He dusted the windowpane for fingerprints, and found one latent print on the inside glass. [Id]. He attached the latent to an offense report, and gave it to Detective Courtney. [Id].

The next witness was Trooper John M. Sparks of the Kentucky State Police. [T.E. Vol. III, p. 10]. Trooper Sparks stated that on May 6, 1981 he interviewed Donna Richardson at her home regarding the alleged rape, and then transported her to King's Daughters Hospital in Frankfort. [T.E. Vol. III, p. 11]. He received the victim's blood sample from a nurse on duty. [T.E. Vol. III, p. 11]. After this, he, Detective Owen, and Detective Courtney went to petitioner's home, and then proceeded to Kentucky State University, where petitioner was arrested. [T.E. Vol. III, pp. 12-13]. Trooper Sparks then identified the gym bag which was taken from petitioner on the evening of his arrest. [T.E. Vol. III, p. 14]. Sparks stated that he returned to his police cruiser from petitioner's home to get some evidence bags, when he felt an object in a gym bag that appeared to be a gun. [T.E. Vol. III, p. 16]. He then took the bag inside the home, and found a gun in the bottom of the bag. [Id]. Sparks then identified the gun previously identified by Ms. Richardson

as the gun stolen from her apartment. Sparks also stated that strips of cloth found in the bag were similar to those described by Ms. Richardson as those with which she had been bound and gagged with. [T.E. Vol. III, p. 18].

Trooper Sparks also testified that, in processing the victim's apartment, he discovered a smashed bullett laying on the floor near the doorway. [T.E. Vol. III, p. 19]. The bullett appeared to have ricocheted off an interior wall behind the door. [Id].

The next witness at trial was Detective Claude Owen of the Kentucky State Police. [T.E. Vol. III, p. 38]. Detective Owen's testimony was substantially the same as that related at the suppression hearing, supra. Additionally, Detective Owen testified that he provided the hospital with a "rape kit" which was administered to Ms. Richardson. [T.E. Vol. III, p. 49].

The next witness for the Commonwealth was Detective Robert Courtney of the Frankfort City Police Department. [T.E. Vol. III, p. 51]. Courtney's testimony is essentially the same as that given at the suppression hearing, supra.[2/]

The next witness for the Commonwealth was Mr. James E. Evans, who was employed by the Kentucky State Police Identification Unit. [T.E. Vol. III, p. 70]. Mr. Evans stated that he received a copy of the latent print taken from the storm door of the residence of Donna Richardson, and also a copy of the inked fingerprints of petitioner after he was arrested. [T.E. Vol. III, p. 73]. After comparing the prints, it was his opinion that the latent fingerprint was the same as the impression on the inked prints of petitioner's left ring finger. [T.E. Vol. III, pp. 73-74]. On cross-examination, Evan's acknowledged that there is no way to determine how old a latent print might be. [T.E. [Id].

2/ At the suppression hearing, Courtney had testified that he had felt the pistol in the gym bag while looking for evidence bags. In an apparent contradiction, Sparks testified at trial that it was himself who had inadvertently discovered what he felt was a pistol in the gym bag. At trial, Courtney testified that "Trooper Sparks went into his vehicle and ran his hand underneath the gym bag and immediately said, 'Look here.' I ran my hand under the bag, and you could tell that there was a weapon in the bag, a pistol." [T.E. Vol. III, p. 55].

Vol. III, p. 82]. Prints on the inside of buildings (i.e., not exposed to atmospheric conditions) can last several years.

The next witness was Mr. Edward Taylor, a forensic serologist with the State Crime Laboratory in Frankfort. [T.E. Vol. IV, p 4]. Taylor testified that he examined Ms. Richardson's blood sample and found her to be a group A secretor. [T.E. Vol. IV, p. 8]. Taylor also determined that the two strips of cloth submitted by Detective Owen were found to contain saliva and group A factors. [Id].

On cross-examination, Taylor stated that while the white towel that was recovered from Mr. James' home contained samples of hair, the hair was dissimilar from the victim. [T.E. Vol. IV, p. 12]. In fact, the hair samples which were found on the white towel were similar to the caucasian head hair and pubic hair of Mrs. James, petitioner's wife. [Id]. The towel also contained acid phosphatase, which is a constituent of semen. [T.E. Vol. IV, p. 13].

Mr. Taylor testified on recross examination that the semen present on the vaginal swabs, vaginal smear, tampon, and panties which were submitted from the victim were too limited in quantity to determine blood type. [T.E., Vol. IV, p. 15].

The final witness for the Commonwealth was Mr. David Adams. [T.E. Vol. IV, p. 16]. Mr. Adams is an employee of the office in which Ms. Richardson was employed. [T.E. Vol. IV, pp. 16-17]. Adams stated that on May 6, 1981, Ms. Richardson returned from lunch sometime between 4:30 and 5:00 p.m. [T.E. Vol. IV, p. 17]. Ms. Richardson came into his office crying, rather nervous and upset. [T.E. Vol. IV, p. 18]. At that time, Ms. Richardson told him that she had been raped. [Id]. He testified that Ms. Richardson told him that she did not report the incident because "That's the only way I could get away, that he'd let me go if I didn't tell anyone. Otherwise, he'd kill me." [Id].

At the close of the Commonwealth's case, petitioner moved for a directed verdict, which was overruled. [T.E. Vol. IV, p. 26].

The first witness for petitioner was Mr. Marion Bates. [T.E. Vol. IV, p. 31]. Mr. Bates testified that he lived at 266 E. Main Street in Frankfort. [Id]. He testified that on May 6, 1981, he was in his yard working on his car. [T.E. Vol. IV, pp. 31-32]. Around noon time, Chuck Lambert approached him and asked him to come and see his basement, which he had renovated. [T.E. Vol. IV, p. 33]. The basement was in the house in which petitioner lived. [Id]. Bates testified that he was in the basement at approximately 12:40 p.m., at which time Mr. Lambert had to return to work. [T.E. Vol. IV, p. 35]. Bates then returned to the driveway to work on his car. [Id]. In the meantime, Bates testified that petitioner had come out of the house, locked the door, and went up the street. [Id]. When Bates was in the house, he heard nothing upstairs but the record player. [Id]. During the time that Bates was out front working on his car, he did not see anyone go in or out of petitioner's apartment. [T.E. Vol. IV, p. 37].

The final witness for petitioner was Mr. Charles Lambert. [T.E. Vol. IV, p. 44]. Mr. Lambert stated that he did not recall showing his property to Mr. Bates on the particular date of May 6, 1981, but that it was not unusual for him to show Mr. Bates his property. [T.E. Vol. IV, p. 46].

Petitioner did not testify. However, at the close of all the evidence, petitioner requested that an admonition be given to the jury with regard to his failure to testify. The motion was overruled. [T.E. (Red Volume) p. 4].

After deliberating, the jury convicted petitioner of second degree burglary, and fixed his sentence at ten (10) years imprisonment. [T.R., p 37]. Also, petitioner was convicted of rape, and sentenced to twenty (20) years imprisonment. [Id]. Finally, the jury convicted petitioner of receiving stolen property, and fixed his punishment at twelve (12) months incarceration. [T.R. p. 38].

After petitioner's conviction on the principal offenses, the trial continued with the persistent felony offender proceedings. At the close of all the evidence in the PFO

proceeding, petitioner moved for a directed verdict, which was overruled. [T.E. Vol. V, p. 47]. The jury convicted petitioner as a first degree persistent felony offender, and fixed his punishment at life in the penitentiary. [T.R., p. 45].

REASON FOR GRANTING THE WRIT

THE OPINION OF THE SUPREME COURT OF KENTUCKY REPRESENTS AN OBVIOUS ATTEMPT BY THAT COURT TO CIRCUMVENT THE MANDATE OF THIS COURT IN CARTER V. KENTUCKY AND DEPRIVES PETITIONER OF THE BENEFIT OF JUDICIAL GUIDANCE AS TO THE JURORS UNDERSTANDING OF THE PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION.

Petitioner, by his counsel, requested prior to the instruction of the jury that "an admonition be given to the jury that no emphasis be given to the defendant's failure to testify . . ." [T.E. (Red Volume) p. 4]. Petitioner submits that the failure to do so deprived him of due process of law.

The law in Kentucky had apparently been to the effect that no comment (even one protective in nature) could be made on a defendant's failure to testify. Green v. Commonwealth, Ky., 488 S.W.2d 339 (1972), interpreting KRS 421.225; but see Spencer v. Commonwealth, Ky., 467 S.W.2d 128 at 130-131 (1971) and Kelley v. Commonwealth, 300 Ky. 136, 187 S.W.2d 796, 800 (1945)(holding that the defendant was entitled to an instruction upon request; the language in Spencer was rejected in Green, supra, as "dicta").

However, petitioner submits that the requested "admonition" in this case is now constitutionally mandated. That petitioner's trial counsel apparently requested an "admonition" rather than an instruction is of no legal significance. Whatever form of judicial guidance is requested, the constitutional underpinnings are the same. The only significant legal concern is that the jury understand a criminal defendant's privelege against self-incrimination. An admonition, which has been defined in Kentucky as "any authoritative oral communication or statement by way of advice or caution by the court to the jury respecting their duty or conduct as jurors . . . ," Miller v. Noell, 193 Ky. 659, 237 S.W. 373, 374 (1922), is functionally equivalent to an instruction.

In Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), this Court reviewed a decision of Supreme Court of Kentucky which affirmed Carter's conviction despite the refusal of the trial court to instruct the jury on Carter's failure to testify. This Court reversed, stating that:

> The freedom of a defendant in a criminal trial to remain silent 'unless he chooses to speak in the unfettered exercise of his own free will' is guaranteed by the Fifth Amendment and made applicable to state criminal proceedings through the Fourteenth. [cite omitted]. And the Constitution further guarantees that no adverse inferences are to be drawn from the exercise of that privilege. [cite ommitted]. Just as adverse comment on a defendant's silence "cuts down on the privilege by making its assertion costly," [cite omitted], the failure to limit the jurors' speculation on the meaning of that silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege. Accordingly, we hold that a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify.
>
> [Id, 101 S.Ct. at 1121-1122].

It cannot be assumed that the jury in petitioner's case did not notice petitioner's failure to testify, and therefore drew no adverse inference therefrom. This Court has labeled such an assumption as "very doubtful . . . speculative . . . [and] dubious . . .." Lakeside v. Oregon, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978).

It is obvious that this Court's decision in Carter v. Kentucky did not turn on the form of the guidance which this court directed file judges to give juries with regard to the privilege against self-incrimination. In Bruno v. United States, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed. 257 (1939), this Court, in interpreting a federal statute, stated that:

> the only way Congress could provide that abstention from testifying should not tell against an accused was by an implied direction to judges to exercise their judicial duty in guiding the jury by indicating the considerations relevant to

the latter's verdict on the facts. [Bruno, supra, 308 U.S. at 293].

This Court surely could not have meant in its opinion in Carter v. Kentucky that a state trial court could only exercise its judicial duty to guide a jury by way of a written instruction. The Court's implicit concern was the psychological operation of the jury's mind, and petitioner submits that a judge can indicate the considerations relevant to the jury's deliberation by oral admonition as well as by written instruction.

(1) This Case Was Not Resolved By The State Court On the Basis Of "Harmless Error."

It is important to note that the Supreme Court of Kentucky did not decide this case on the basis of harmless error. Rather, the Supreme Court of Kentucky's disposition of this issue was decided entirely on the terminology of petitioner's request:

> James requested that the trial court give an "admonition" to the jury that no emphasis be given to James' failure to testify. This request was denied by the trial court. In his argument on this appeal James attempts to equate this request for an admonition with a request for an "instruction" on failure of the defendant to testify. Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), held that a state trial judge has the constitutional obligation to give a prophylactic instruction upon proper request to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify. There is a vast difference in a request for an admonition and a requested instruction. James is entitled to the instruction, but did not ask for it. The trial court properly denied the request for an admonition. [A., p. 3].

Had the Kentucky court chosen to decide this case on "harmless error," it would have done so. Only two weeks prior to the opinion of the Kentucky Supreme Court in petitioner's case, the Court decided Commonwealth v. McIntosh, Jr., Ky., ___ S.W.2d. ___ (February 16, 1983) (30 Kentucky Law Summary 9). In McIntosh, the Kentucky Supreme Court stated that:

> . . . Carter leaves open the question of whether under certain circumstances the failure to give the requested instruction could be nonprejudicial error pursuant to the standards set in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).
>
> * * *
>
> Here proof of guilt was overwhelming. . . . Careful examination of the record does not indicate that any different result would have been achieved in this case.
>
> It is the holding of this court that the failure to give a requested instruction on the affect of the defendant's refusal to testify can be nonprejudicial error if there is overwhelming evidence of guilt and the result would not have been any different when the case is considered as a whole.

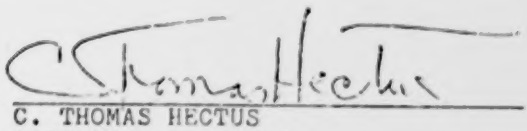
Obviously, the Kentucky Supreme Court would have applied the doctrine of harmless error, had it thought that the error in petitioner's case was harmless. Because the Kentucky court chose to decide this case on the form of petitioner's request, the merit of petitioner's request is properly before this Court.

Petitioner submits that because the trial court refused his timely request for an admonition on his right to not testify, this Court should grant this petition, reverse his conviction, and grant him a new trial.

CONCLUSION

Petitioner's case present an opportunity for this Court to reaffirm the clear mandate of Carter v. Kentucky, and further, provides an opportunity to prevent state appellate courts from distorting the clear import of the decisions of this Court. Because the decision of the Supreme Court of Kentucky in this case conflicts with the rationale of Carter v. Kentucky, a Writ of Certiorari should issue to review the opinion of the Supreme Court of Kentucky.

Respectfully submitted,



C. THOMAS HECTUS
GITTLEMAN & BARBER
635 West Main Street
Louisville, Kentucky 40202
(502) 585-2100

COUNSEL FOR PETITIONER

A P P E N D I X

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Supreme Court of Kentucky

FINAL
82-SC-394-MR
DATE APR 20 1983 Lou Combs, D.C.

MICHAEL P. JAMES — APPELLANT

V.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE HENRY MEIGS, JUDGE
#81-CR-0106

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY JUSTICE STEPHENSON

Affirming

Michael P. James was tried and convicted for the offenses of second-degree burglary, KRS 511.030, first-degree rape, KRS 510.040, and receiving stolen property, KRS 514.110. At the persistent felony offender phase of the trial, James was convicted as a first-degree persistent felony offender and the conviction for first-degree rape was enhanced to life imprisonment. James was sentenced to life imprisonment on the persistent felony offender charge and to ten years' imprisonment on the burglary charge to run concurrently. He was sentenced to twelve months in jail on the receiving stolen property charge to run consecutively with the two felonies. We affirm.

James' first assertion of error is that the trial court erroneously declined to sever the charges against him. He argues that the requirements for joinder under RCr 6.18 are not present. The three crimes here were closely related in character, circumstances, and time, and we are of the opinion there is no showing of abuse of discretion and prejudice in the joinder of the offenses

for trial. Seay v. Commonwealth, Ky., 609 SW 2d 128 (1981) and Cardine v. Commonwealth, Ky., 623 SW 2d 895 (1981). The burglary of the victim's apartment, the rape and finding property stolen from the apartment in the possession of James all occurred within a two-week period.

The evidence of the broken pane of glass and James' fingerprint in our opinion is sufficient evidence to submit the charge of burglary to the jury.

"If under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict." Trowel v. Commonwealth, Ky., 550 SW 2d 530, 533 (1977).

Mere possession of the stolen pistol is sufficient to submit the case to the jury. KRS 514.110(2). James offered no explanation for his possession of the pistol, and there is nothing in the evidence to show that it was unreasonable for the jury to find a guilty verdict.

When arrested on the rape charge, James was carrying a gym bag. The arresting officer asked James about the bag and was informed by James that someone had handed it to him and that he did not know to whom it belonged. Later, while the gym bag was in the police cruiser and officers were executing a search warrant by searching James' house, one of the officers ran his hand under the gym bag on the car seat and felt what seemed to him to be a pistol. He then proceeded to open the bag and found a pistol, which was later identified by the victim as being the pistol stolen from her apartment some days prior to the rape.

James moved to suppress the evidence of the pistol on the ground of an illegal search and seizure. He did not testify at the suppression hearing. At the hearing, the arresting officer testified that James had denied being owner of the bag and that some "dude" had handed it to him as he left the gymnasium.

The trial court denied the motion to suppress. James argues the major premise that the Commonwealth must rely on the "plain view" and "exigency" cases in this situation and that these propositions do not apply. This argument misses the real question, which is analogous to the expectation of privacy cases. We are of the opinion the search here did not violate any expectation of privacy on the part of James. He denied being owner of the bag. There is no "search" here for purposes of the Fourth Amendment, and there is a total absence of any legitimate expectation of privacy. Cf. Sussman v. Commonwealth, Ky., 610 SW 2d 608 (1981), and Rawlings v. Kentucky, 448 U.S. 98, 100A S.Ct. 2556, 65 L.Ed. 2d 633 (1980).

James requested that the trial court give an "admonition" to the jury that no emphasis be given to James' failure to testify. This request was denied by the trial court. In his argument on this appeal James attempts to equate this request for an admonition with a request for an "instruction" on failure of a defendant to testify. Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed. 2d 241 (1981), held that a state trial judge has the constitutional obligation to give a prophylactic instruction upon proper request to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify. There is a vast difference in a request for an admonition and a requested instruction. James was entitled to the instruction, but did not ask for it. The trial court properly denied the request for an admonition.

The proof of the Commonwealth on the persistent felony offender phase of the trial was that James entered a guilty plea in Nebraska to a felony charge of forgery in 1972 and was sentenced to probation for a period of two years. Later that year in Virginia, James entered a guilty plea to murder and was sentenced to twenty-eight years' imprisonment. James was on parole from this conviction when he committed the offenses here.

James argues that the Nebraska conviction does not meet the requirements of KRS 532.080(2)(a):

> "(2) ... As used in this provision, a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided:
>
> "(a) That a sentence to a term of imprisonment of one year or more or a sentence to death was imposed therefor; ... ."

The Commentary accompanying this subsection in the Kentucky Penal Code, Final Draft November 1971, p. 347, is as follows:

> "Subsection (2) sets forth a definition of a previous felony conviction. It requires in Subdivision (a) that the previous offense must have been accompanied by a sentence of imprisonment for one year. This requirement seeks to account for the possibility of conviction from a state which has a distinction between felony and misdemeanor that is different from that used in this state. Thus, although such conviction is for an offense designated in that other state as a misdemeanor, it can be treated as a felony for purposes of this statute if it carried a penalty of one year or more." (Emphasis added.)

We have consistently relied upon the Commentary as an expression of legislative intent. It is apparent that the statute does not require actual imprisonment as was the case in the former statute, and reasons for the use of the term "imprisonment" in and of itself are fully explained in the Commentary. Here the offense in Nebraska was a forgery, which is a felony in this state.

Finally James argues that the trial court erroneously ordered the misdemeanor conviction to be served consecutively with the felony convictions. James argues that our opinion in Powell v. Payton, Ky., 544 SW 2d 1 (1976), should be applied to the situation here. It is true that as a general proposition KRS 532.110(1) construed together with KRS 532.090 and KRS 532.060 mandates

that a misdemeanor sentence be served concurrently with the indeterminate sentence for a felony. That proposition would obtain here save for the application of KRS 533.060(2) which provides in part that when a defendant "is convicted or enters a plea of guilty to a felony committed while on parole, ..., the period of confinement for that felony shall not run concurrently with any other sentence."

The legislature has determined that offenses committed while on parole shall be dealt with in a harsher manner, and this clear expression of the legislature takes this case out of the rule in Powell.

The judgment is affirmed.

All concur.

ATTORNEYF FOR APPELLANT:

Jack Emory Farley
Public Advocate

John Michael Brown
Gittleman & Barber
800 Marion E. Taylor Building
Louisville, Kentucky 40202

ATTORNEYS FOR APPELLEE:

Steven L. Beshear
Attorney General

Penny R. Warren
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

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SUPREME COURT U.S.

NO. 82 6840

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

MICHAEL P. JAMES — PETITIONER

VS.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMMONWEALTH OF KENTUCKY — RESPONDENT

* *

The petitioner, Michael P. James, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Kentucky without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The petitioner has been permitted by the Kentucky courts to proceed as an indigent at all stages of this action. The petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

C. Thomas Hectus

C. THOMAS HECTUS
GITTLEMAN & BARBER
635 West Main Street
Louisville, Kentucky 40202
(502) 585-2100

COUNSEL FOR PETITIONER

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

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SUPREME COURT U.S.

NO. 82 6840

MICHAEL P. JAMES — PETITIONER

VS. AFFIDAVIT OF INDIGENCY

COMMONWEALTH OF KENTUCKY — RESPONDENT

* *

Comes affiant, Michael P. James, being duly sworn and states in support of his motion to proceed in forma pauperis:

1. I am the petitioner in the above-styled case.

2. Because of my poverty I am unable to pay the costs of this proceeding.

3. I am unable to give security for the same.

4. I have no savings account. I do not own any valuable property.

6. I am presently incarcerated at the Kentucky State Penitentiary, Eddyville, Kentucky.

Further the affiant sayeth not.

_____
MICHAEL P. JAMES

Subscribed and sworn to before me by Michael P. James this ___ day of _____, 1983.

My Commission expires: _____.

_____
NOTARY PUBLIC - STATE AT LARGE

Office - Supreme Court, U.S.
FILED
DEC 9 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-6840

In the Supreme Court of the United States

OCTOBER TERM, 1983

MICHAEL P. JAMES, PETITIONER,

v.

KENTUCKY, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

JOINT APPENDIX

C. THOMAS HECTUS
GITTLEMAN & BARBER
635 West Main Street
Louisville, Kentucky 40202
(502) 585-2100
COUNSEL FOR PETITIONER

PENNY R. WARREN
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
(502) 564-4025
COUNSEL FOR RESPONDENT

PETITION FOR CERTIORARI FILED MAY 27, 1983
CERTIORARI GRANTED OCTOBER 17, 1983

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	DOCKET ITEM

September 30, 1981—Michael P. James (Petitioner) was indicted by the Franklin County (Kentucky) Grand Jury for the offenses of Burglary in the Second Degree, Rape in the First Degree, Receiving Stolen Property Under $100, Possession of a Handgun by a Convicted Felon, and Persistent Felony Offender in the First Degree.

January 18-19, 1982—Petitioner was tried by jury on all principal charges contained in the indictment except Possession of a Handgun by a Convicted Felon, which was dismissed prior to trial.

January 28, 1982—Petitioner was tried as a Persistent Felony Offender in the First Degree. Petitioner was convicted and his sentence enhanced to life imprisonment.

January 29, 1982—Final judgment was entered in the Franklin Circuit Court, which judgment imposed a sentence of life imprisonment in accord with the jury's verdict.

February 8, 1982—Petitioner filed his Notice of Appeal to the Supreme Court of Kentucky.

March 30, 1983—The Supreme Court of Kentucky rendered its opinion in Petitioner's case affirming his conviction.

FRANKLIN CIRCUIT COURT
INDICTMENT No. 81-CR-0106

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

MICHAEL P. JAMES, DEFENDANT

TRANSCRIPT OF RECORD

INDICTMENT

COMMONWEALTH OF KENTUCKY

vs.

MICHAEL P. JAMES, DEFENDANT

Indictment No. 81-CR-0106
KRS 511.030
Burglary in the Second Degree
Class C Felony
KRS 510.040
Rape in the First Degree
Class B Felony
KRS 514.110
Receiving Stolen Property—
Class A Misdemeanor
KRS 532.080
Persistent Felony
Offender in the First Degree
Class A Felony

The Grand Jury charges:

COUNT I

On or about the 1st day of May, 1981, in Franklin County, Kentucky, the above named defendant, Michael P. James, did commit the offense of burglary in the second degree when, with intent to commit a crime, he broke into the dwelling of Donna Richardson,

COUNT II

On or about the 6th day of May, 1981, in Franklin County, Kentucky, the above named defendant, Michael P. James, did commit the offense of rape in the first degree when he engaged in sexual intercourse by compulsion with Donna Richardson,

COUNT III

On or about the 6th day of May, 1981, in Franklin County, Kentucky, the above named defendant, Michael P. James, did commit the offense of receiving stolen property when, with no intent to return it to the lawful owner, he re-

ceived and retained possession of stolen personal property having a value of less than one hundred dollars ($100),

COUNT IV

The Grand Jury further charges that the defendant, Michael P. James, committed the offense of being a persistent felony offender in the first degree when being more than twenty-one (21) years of age and who stands convicted of two (2) or more felonies after having been convicted of a prior felony,

against the peace and dignity of the Commonwealth of Kentucky.

A TRUE BILL

/S/ _____
FOREMAN OF THE GRAND JURY

WITNESSES: Detective/Sergeant Robert N. Courtney, Frankfort Police Department, Frankfort, Kentucky.

[39] COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT

INSTRUCTION NO. 1
(Second-Degree Burglary)

You will find the defendant, Michael P. James, guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Franklin County, Kentucky, on or about the 1st day of May, 1981, and before the finding of the indictment herein, he entered unlawfully and without permission the dwelling of Donna Richardson;

(b) That in so doing he knew he did not have such permission;

AND

(c) That he did so with the intention of committing the crime of theft therein.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than five (5) years nor more than ten (10) years, in your discretion.

[40] **INSTRUCTION NO. 2**
(First-Degree Rape)

You will find the defendant, Michael P. James, guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Franklin County, Kentucky, on or about the 6th day of May, 1981, and before the finding of the indictment herein, he engaged in sexual intercourse with Donna Richardson;

AND

(b) That he did so by forcible compulsion.

If you find the defendant guilty under this instruction, you shall fix his punishment at confinement in the penitentiary for not less than ten (10) years nor more than twenty (20) years, in your discretion.

[41] **INSTRUCTION NO. 3**
(Receiving Stolen Property)

You will find the defendant, Michael P. James, guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Franklin County, Kentucky, on or about the 6th day of May, 1981, and within twelve (12) months before the finding of the indictment herein, he possessed a pistol owned by Donna Richardson;

(b) That the pistol had been stolen from Donna Richardson and the defendant knew it was stolen property;

AND

(c) That in possessing said pistol it was not the defendant's intention to return it to its rightful owner.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the Franklin County Jail for a period not to exceed twelve (12) months, at a fine not to exceed five hundred dollars ($500), or at both confinement and fine, in your discretion.

[42] **INSTRUCTION NO. 4**
(Definitions)

(a) "Sexual Intercourse"—means sexual intercourse in its ordinary sense but is limited to sexual intercourse between persons not married to each other.

(b) "Forcible Compulsion"—means physical force that overcomes earnest resistance or a threat, express or implied, that overcomes earnest resistance by placing a person in fear of immediate death or physical injury to himself.

[43] **INSTRUCTION NO. 5**

The law presumes a defendant to be innocent of a crime, and the indictment or warrant shall not be considered as evidence or as having any weight against him. You shall find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty.

[44] **INSTRUCTION NO. 6**

The verdict of the jury must be unanimous and signed by one of you as Foreman. You may use the form provided at the end of these instructions in writing your verdict.

JUDGEMENT AND SENTENCE OF PLEA OF NOT GUILTY
(Jury Trial)

COMMONWEALTH OF KENTUCKY

v.

MICHAEL P. JAMES

FILED JANUARY 29, 1982

The defendant at arraignment having entered a plea of not guilty to the following charges included within the indictment(s) (1) Burglary, Second Degree (2) Rape, First Degree (3) Receiving Stolen Property (4) Persistent Felony Offender, First Degree and having on the 18 & 27 day of January, 1982, appeared in open court with his attorney Honorable Willie Peale, the case was tried before a jury which returned the following verdict:

We, the Jury, find the defendant, Michael P. James, guilty under Instruction No. 1 and fix his punishment at 10 years in the penitentiary. /s/ James M. Glenn, Foreman (Burglary)

We, the Jury, find the defendant, Michael P. James, guilty under Instruction No. 2 and fix his punishment at 20 years in the penitentiary. /s/ James M. Glenn, Foreman (Rape).

We, the Jury, find the defendant, Michael P. James, guilty under Instruction No. 3 and fix his punishment at 12 months in the Franklin County Jail. /s/ James M. Glenn, Foreman (Receiving Stolen Property)

We, the Jury, find the defendant, Michael P. James, guilty under Instruction No. 1 and fix his punishment at Life in the penitentiary. /s/ James M. Glenn, Foreman (Persistent Felony Offender, First Degree)

On the 28th day of January, 1982 the defendant appeared in open court with his attorney Hon. Willie Peale and the court inquired of the defedant and his counsel whether they had a legal cause to show why judgment should not be pronounced, and afforded the defendant and his counsel the opportunity to make statements in the defendant's behalf and

to present any information in mitigation of punishment, and the court having informed the defendant and his counsel of the factual contents and conclusions contained in the written report of the presentence investigation prepared by the Division of Probation and Parole, the Defendant ☐ agreed with the factual contents of said report ☐ was granted a hearing to controvert the factual contents of the report. Having given due consideration to the written report of the Division of Probation and Parole, and to the nature and circumstances of the crime, and to the history, character and condition of the defendant, the court is of the opinion:

That imprisonment is necessary for the protection of the public because:

A. there is a substantial risk that defendant will commit another crime during any period of probation or conditional discharge.

B. the defendant is in the need of correctional treatment that can be provided most effectively by the defendant's commitment to a correctional institution.

No sufficient cause having been shown why judgment should not be pronounced, it is ADJUDGED BY THE COURT that the defendant is GUILTY of the following charge(s).

Persistent Felony Offender, First Degree (Rape, First Degree)
Burglary, Second Degree
Receiving Stolen Property

and sentenced to:

imprisonment for a maximum term of Life (Persistent Felony Offender, First Degree) and ten (10) years (Burglary) in the Department of Correction to run concurrently with each other; and to twelve (12) months in the Franklin County Jail to run consecutively with the two previous felony convictions mentioned.

It is further ORDERED that the sheriff of Franklin County deliver the defendant to the custody of the Department of Corrections at such location within this Commonwealth as the Department shall designate.

It is further ORDERED that the defendant is hereby credited with time spent in custody prior to sentence, namely 269 days as certified by the jailer of____ towards service of the maximum term of imprisonment (or toward payment of a fine at the rate of $5 per day).

After imposing sentence, the court informed the defendant that he has a right to appeal with the assistance of counsel; that if he is financially unable to afford an appeal, a record will be prepared for him at public expense and counsel will be appointed to represent him; that an appeal must be taken within 10 days of the date of this judgment, and that the clerk of the court will prepare and file a notice of appeal for him within that time if he so requests. Pending appeal, the defendant is remanded to custody.

January 28, 1982 (Date)

/s/ _____

(Judge) Division One

Judgement entered and notice of entry served on the defendant by mailing a true copy to defendant's counsel of record, _____,

postage prepaid, on January 29, 1982.

/S/ _____

Clerk

by. _____

D.C.

NOTE TO CLERK: If defendant is sentenced to death or confinement, give two certified copies of this judgment to the sheriff who delivers him to the institution. RCr 11.22.

SHERIFF'S RETURN

FRANKLIN CIRCUIT COURT
Indictment No. 81-CR-0106

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

MICHAEL P. JAMES, DEFENDANT

TRANSCRIPT OF TRIAL

* * * * *

JANUARY 18-19, 1982

[Vol. II, p. 5] (The following was heard in Chambers:)

MR. PEALE: Your Honor, at this time the defense would like to present two motions. The first motion is for a severance of the counts in the indictment. We feel that the effect of the indictment being tried as returned by the Grand Jury is prejudicial to the defendant, and that it inflames the jury as to the nature of the offenses stated and has a cummulative effect, and has listing various counts, several various counts of criminal activity. We think this is inconsistent with the presumption of innocence that is afforded the defendant and we would request that, though probably due to certain deficiency that he be tried in this manner, that the count as far as burglary and persistent felony offender be served from the other charge of rape.

THE COURT: All right. Mr. Corns?

MR. CORNS: Your Honor, under Rule 9.12 of Criminal Rules, it states the Court may order two or more indictments be tried together if the offenses and defendants could have been joined in a single indictment. That even authorizes the Court to join separate indictments for trial, involving various defendants. In this case, the defendant was indicted in the same indictment for all these offenses. Secondly, they are related in time. The burglary took place on May 1st, 1981. The rape occurred six days later on May the 6th, [Vol. II, p. 6] 1981, at which time the defendant was also charged with possession of stolen property which had occurred on April 23rd previously. There is no separate charge concerning the burglary on April 23rd. So they're all related in time and substance, and I can see no prejudice to the defendant.

However, there is one count in the indictment we would have to move be dismissed, Count IV, charging Possession of a Handgun by a Convicted Felon, since under that statute he has to have been convicted after January 1, 1975 and his conviction falls before 1975, this most recent conviction. So we would move—

THE COURT: You mean the time of the possession? The time of the possession was 1981.

MR. CORNS: But you must be convicted—I was thinking that that provision had been amended and taken out, but just to be doubly sure, I want to look at 527.040, and they have stuck a last section on there which says, the provisions of this section shall only apply to persons convicted after January 1, 1975. And I believe his last conviction was in '73, '72 or '3.

THE COURT: The two prior felonies you're relying on for the P.F.O. charge are prior to 1975?

MR. CORNS: And under that then we would not be able to make these on the basis of the information I have at this time.

[Vol. II, p. 7] THE COURT: All right. Strike Count IV.

MR. CORNS: But we would object for the reasons stated to separation of any of the other charges.

THE COURT: All right. I will overrule the motion with the observation that even though it's a rebuttable presumption, the presumption of innocence is a fiction which is used only as another means of saying that a defendant cannot be convicted unless and until he is proven guilty beyond a reasonable doubt. And it ought to be worded that one charged with a crime should not be presumed guilty unless and until proven so beyond a reasonable doubt by solid, substantial, and credible evidence. I'm starting the crusade today. All right?

MR. PEALE: The second matter is in regards to the amended P.F.O. charge which is, I believe, Count V. We, it's the defense position that the indictment should be amended to P.F.O. Second Degree. The basis for, or the grounds for our motion are so stated in compliance with the statute. It's the statutory language, is that a felony for the purposes of enhancement under Section 2 and also under Section 3 and the Subsection A of each section, that as used in this provision, a previous felony conviction is a felony in this state or conviction of a crime in any other jurisdiction provided (A) that a sentence to a term of [Vol. II, p. 8] imprisonment of one year or more a sentence to death was imposed therefor.

According to certified records that the defense counsel received from the state of Nebraska in regards to what is termed as another felony charge, in which there was a conviction. There was no sentencing to a term of imprisonment of one year or more. The defendant was sentenced to a term of two years' probation, which we feel does not fall under the control of the statute. And basically, the other, the, basically the other sections or I should say subsections of the chapter, refer to a person's current status. Now, one being on probation or parole from the previous felony conviction which this is not. Mr. James is on parole from a murder charge, and the charge in Nebraska is in regards to the forgery count.

And we think that based on the facts as stated in the record, the indictment should be amended to Persistent Felony Offender Second Degree.

THE COURT: All right. Mr. Corns?

MR. CORNS: Pursuant to our last meeting with the Court, at the close of that hearing the Court may recall we advised that our records indicated Mr. James had been sentenced to a term of two years' probation and assigned for supervision to Mr. Clayton DeMott whom the defendant said he did not know. But it is so stated in the order from Mr. Peale has just made reference.

[Vol. II, p. 9] I talked with Mr. DeMott on the phone. He said he was the probation officer for this defendant. It is a felony sentence in Nebraska. The only amendment made, there was a reference made in the sentencing to the fact that the information or the indictment had been amended; and he said the only amendment was just in wordage and was not a reduction of the charge, that it was a felony. And it does state in there that he was sentenced to two years' probation. So I think that that's within the purview and intent of the statute.

THE COURT: Is a sentence of two years' probation a sentence to two years or is the same as a sentence to two years in confinement?

MR. CORNS: I asked him about that and he said that that's just the way it read. It's the same as if they were

sentenced to the state penal institution, but the judge just wrote it that way, or the clerk.

THE COURT: Well, doesn't the statute say somethign about it, the penal code, as to what constitutes P.F.O. First conviction or—

MR. CORNS: Well, whether it's P.F.O. First or Second, that a sentence to a term of imprisonment of one year or more or sentence to death was imposed, and that he completed the service or was on probation or parole. So he never really had to serve any time at all. You've just got to show the conviction.

[Vol. II, p. 10] THE COURT: It does say or probation?

MR. CORNS: Or was on probation or parole.

MR. PEALE: From previous felony conviction.

MR. CORNS: Previous felony conviction. He never actually served any time on this.

MR. PEALE: That is our position, is that sentence for probation does not fall within the explicit language of the statute.

MR. CORNS: Taking that analogy, if he were sentenced as Mr. Peale contends that he had to be, for example here, to the Department of Corrections, and then was granted immediate probation at the sentencing stage, you couldn't use that.

MR. PEALE: No. My position is that if he's sentenced by the Court to probation you couldn't use it until you revoke—

THE COURT: That's not a sentence to a term of imprisonment.

MR. PEALE: That's right. That's not a term of sentence to a term of prison. Now, if he would have been revoked then, okay, and I think that's not the situation we have according to the records. I think further [Vol. II, p. 11] that as to the applicability of the other sections there's no record to say that Mr. James was currently on probation or parole from that Nebraska charge at the time of this criminal incident. So I wouldn't think that the use of that charge would still fall within the application of the statutes.

THE COURT: Well, it is a bit ambiguous in that it says that the offender completed service of the sentence

imposed on any of the previous felony convictions within five years prior to the date of the commission of the felony of which he now stands convicted, or was on probation or parole from any of the previous felony convictions at the time of the commission of the felony for which he now stands convicted, or was discharged from probation or parole on any of the previous felony convictions.

MR. CORNS: He was discharged from parole, I believe, two years later, '74.

MR. PEALE: And I think the fact that there is the conjunctive word and means that you have to look at the whole section of the statute collectively to fit within all of those prerequisites. If that was further language of or in between the Subsection A, 2A, and the following section, then it would be different. But the language clearly states and under Subsection A of Section 2 and Sections 3. So that is, as in instructed by the court, conjunctive and you have to meet each of those elements, which we say in the records of [Vol. II, p. 12] Nebraska would permit being done.

THE COURT: But as to the offender it says completed service or was on probation or parole from any previous felony conviction.

MR. PEALE: Yes. And that's true.

THE COURT: So either way, if he serves and completed the sentence or is paroled or probated, it stands as a felony conviction.

MR. PEALE: Whereas, 3A says that a sentence of a term of imprisonment of one year or more or sentence imposed therefor, and, and then that leads to the age requirement—

THE COURT: It doesn't say that he served it or was confined to that, just that it was a sentence.

MR. PEALE: But a sentence to a term of imprisonment. And we don't have that here. There was no sentence to a term of imprisonment.

THE COURT: There has to be a term to be probatable.

MR. PEALE: No. That's speaking according to Kentucky law.

THE COURT: Probation is simply suspension of the sentence or deferment of the sentence pending good behavior.

MR. PEALE: True, Your Honor. And [Vol. II, p. 13] the fact of the matter is that according to the records that we have, which are supposedly representative of what did occur in Nebraska, there was no sentence to a term of imprisonment and that is what we have requested the Court to make its finding on.

THE COURT: Well, I take it that there must be a sentence of confinement on a felony, whether probated or otherwise, to fit all the circumstances set forth within the section of the Code we're dealing with, 532.080, and that this probation from Nebraska does count as a conviction of a felony for purpose of this section, persistent felony offender. So I'll overrule your motion there. * * * * *

[Vol. II, p. 17] * * *

MR. CORNS: In order that we might, or Mr. Peale might want to take this up on voire dire, we would specifically move the Court that in the event the defendant elects to take the stand and testify that we be allowed to impeach his credibility under the Cotton case by asking him if he has not been convicted of a felony, to wit, forgery, which occurred in 1972 in the state of Nebraska and about which we have just been conversing, because it does go to moral terpitude. It's clearly within the last ten years, and some of the cases even go back as far as fifteen years or more for relevancy. And I would not be able to ask about the murder conviction until we get to the P.F.O. phase if and when that does become a reality; but it may be something which he will need to feel he address himelf in the voire dire. I don't know. Because it will be the same jury.

[Vol. II, p. 18] MR. PEALE: Yes. I—

MR. CORNS: So we would specifically move the Court that in the event he elects to testify, we be allowed to ask the Cotton question.

MR. PEALE: Naturally, we object because we think that it would be prejudicial. However, according to the rules of evidence in this Commonwealth and the case law, the prosecution would have that right if the witness, defendant, did take the stand.

THE COURT: All right.

MR. CORNS: We have no further motions.

* * * * *

(At this point the prospective jurors were sworn to truthfully answer all question as may be asked of them concerning their qualifications to sit as jurors in this case, and the following was heard in open court:)

THE COURT: All right, Mr. Corns. You may ask.

MR. CORNS: May it please the Court, Mr. Peale. Good morning, ladies and gentlemen. I'm Ray Corns, Commonwealth Attorney, and we prosecute felony criminal cases here

[Vol. II, p. 23] MR. HOGAN: I think I've read about it.

MR. CORNS: You've heard or read about it. Did you form any opinion, and I'm not asking you what that opinion is, on the basis of what you read or heard?

MR. HOGAN: I did form an opinion.

MR. CORNS: I'll ask you the same question I asked him. Could you and would you be able to set that opinion totally and completely aside and be a fair and impartial juror?

Do you understand that's the purpose of our asking questions, and Mr. Peale will ask some in a few minutes? We try to assist both sides in selecting a fair jury in the case, and it's not to pry into your thoughts or personal habits or anything like that.

Any of the rest of you read or heard about the case?

Do you understand that under the law in this state that the defendant is presumed innocent until proven guilty beyond a reasonable doubt? You understand that that's the law?

Will you grant to this defendant that presumption if you sit in this case?

Do you understand, however, the Commonwealth is not required to prove this defendant guilty beyond all doubt, but beyond a reasonable doubt?

* * * * *

[Vol. II, p. 30] question. It really encompasses everything that Mr. Peale or I will ask you. If you sit as a juror in this case, will you give both sides, the defense and the prosecution, a fair trial? That's all we have a right to ask you to do. Will you do that?

Thank you very much. Judge, the Commonwealth passes the jury.

THE COURT: Mr. Peale, you may ask.

MR. PEALE: Good morning. I'm Willie Peale, counsel for the defendant, Mike James. As Mr. Corns has stated to you, what we're doing in this stage of the proceeding is basically asking a few questions to see at this point what sort of attitudes you have in regards to whether you would be able to fairly try this case.

I know some of the questions that I might ask might be repetitive as to what Mr. Corns has asked, but please bear with me.

Okay. First, I would like to know if any of you have ever served on a jury other than during this jury term.

Okay. And when I say this jury term I mean this month.

All right. Ms. Furnish, what type trial was it, civil or criminal?

MS. FURNISH: Both; one of each, I think.

MR. PEALE: One of each. [Vol. II, p. 31] How long ago was this?

MS. FURNISH: I think around four years ago.

MR. PEALE: Around four years ago? Do you recall what kind of criminal trial it was?

MS. FURNISH: Assault.

MR. PEALE: Assault? Do you recall what sort of verdict was returned?

MS. FURNISH: I think it was not guilty.

MR. PEALE: Now, any other criminal trials?

MS. FURNISH: No.

MR. PEALE: That you participated in? Mr. Glenn?

MR. GLENN: I served on a grand jury one term.

MR. PEALE: Grand jury?

MR. GLENN: And also on a petit jury, but all the cases were taken care of before they came to trial.

MR. PEALE: So you never heard a case?

MR. GLENN: No.

MR. PEALE: So you have no [Vol. II, p. 32] experience other than serving on a grand jury with a criminal trial in which there was an execution of a verdict?

MR. GLENN: Right.

MR. PEALE: When were you on a petit jury?

MR. GLENN: Oh, it's been approximately fifteen years ago.

MR. PEALE: Did you form any sort of opinion and attitudes about prosecution of crime? Was it in Franklin County?

MR. GLENN: Yes.

MR. PEALE: And you say you didn't form any attitudes in regards to any prosecution of trials at that time?

MR. GLENN: No.

MR. PEALE: Mr. Harris? Mr. Harris, you said you served as a juror earlier. Was it civil or criminal?

MR. HARRIS: Civil.

MR. PEALE: In a civil?

MR. HARRIS: It's been six or seven years ago. It was some land the state wanted.

MR. PEALE: Okay. In other words, so foreclosure?

MR. HARRIS: Condemnation or [Vol. II, p. 33] something like that.

MR. PEALE: And no criminal trial experience as a juror?

MR. HARRIS: No.

MR. PEALE: Was that in Franklin County?

MR. HARRIS: Franklin County.

MR. PEALE: It was? Okay. Yes, sir? Mr. Hilton, what type of trial did you serve in as a juror?

MR. HILTON: Didn't serve in any. We had two or three cases called up, but they were settled before they came to jury.

MR. PEALE: Were you on the same ground with Mr. Glenn?

MR. HILTON: It's been some years ago when I was on a jury.

MR. PEALE: So in other words, you're saying you were on a petit jury?

MR. HILTON: That's right.

MR. PEALE: Never really got a chance to try a case?

MR. HILTON: That's right.

MR. PEALE: Did you sit in on any other cases that were tried during that term?

MR. HILTON: No.

[Vol. II, p. 34] MR. PEALE: So you don't have any attitudes one way or the other as to serving as a jury trying a case?

MR. HILTON: No.

MR. PEALE: Thank you, sir. Yes? I should ask Mr. Hilton, was that in Franklin County?

MR. HILTON: Yes.

MR. PEALE: Mr. Warfield, what type trial did you serve in?

MR. WARFIELD: Civil.

MR. PEALE: Civil? Was this involving any kind of personal injury or anything of this nature?

MR. WARFIELD: On this jury. I sat on, served on a civil case.

MR. PEALE: Last week, right?

MR. WARFIELD: Last week.

MR. PEALE: And you say it wasn't a personal injury, Mr. Warfield?

MR. WARFIELD: No.

MR. PEALE: So you don't have any inclination as to strong attitudes and serving as a juror in a trial?

MR. WARFIELD: No.

MR. PEALE: Have any, well, have any of your family members been members of a grand jury on a [Vol. II, p. 35] state or even a federal level?

MS. FURNISH: My mother was on a grand jury in this court last year.

MR. PEALE: Last year? Did you discuss her function as a member of that grand jury?

MS. FURNISH: No.

MR. PEALE: You did not?

MS. FURNISH: No.

MR. PEALE: Did you, as a result of that, form any attitudes as to the responsibility and role served in at that time?

MS. FURNISH: No.

MR. PEALE: Anyone else?

MS. DEAN: My husband served on a grand jury several years ago.

MR. PEALE: Is it Dean?

MS. DEAN: Yes.

MR. PEALE: And you said your husband served several years. Is this grand jury?

MS. DEAN: Grand jury.

MR. PEALE: Was it state grand jury here in Franklin County?

MS. DEAN: Yes.

MR. PEALE: Did you discuss his functions as a member of that jury?

[Vol. II, p. 36] MS. DEAN: After it was settled, of course, he talked with me about some of the things.

MR. PEALE: Okay. Did you form any strong opinion about, let's say, crimes in Franklin County as a result of that?

MS. DEAN: No.

MR. PEALE: Do you feel that you could, as a result of information sit here and impartially try this case based on the evidence, fairly?

MS. DEANE: Yes.

MR. PEALE: Anyone else?

MR. CHELF: I've been on a jury before but wasn't called for jury.

MR. PEALE: You didn't really have to come in?

MR. CHELF: Well, I came in but was not selected.

MR. PEALE: Did you sit in on other trials?

MR. CHELF: No.

MR. PEALE: Mr. Hogan?

MR. HOGAN: My wife was on a jury several years ago. I don't know exactly when. We didn't discuss it at all.

MR. PEALE: So you didn't have any [Vol. II, p. 37] attitudes formed as a result of that?

MR. HOGAN: No.

MR. PEALE: Okay. Yes?

MS. MOCCIA: My husband was on the jury last year, but I didn't form any opinions.

MR. PEALE: Did you discuss—

MS. MOCCIA: No, not until after the case was over.

MR. PEALE: You did not form any strong attitudes...

MS. MOCCIA: No.

MR. PEALE: . . . as to the trying of a case and crimes in Franklin County?

MS. MOCCIA: No.

MR. PEALE: Anyone else? Now, I would like to ask whether any of your family members are engaged or work in law enforcement, or close friends. Okay. I understand your husband does. What sort of work does he do?

MS. HARNEY: He's Chief of Police in Frankfort.

MR. PEALE: Okay. Have you, as a result of your husband's job, formed any strong attitudes about crimes and prosecution of crimes here in Franklin County?

MS. HARNEY: Yes.

MR. PEALE: Do you feel that those [Vol. II, p. 38] attitudes would prevent you from impartially and fairly hearing this case?

MS. HARNEY: No.

MR. PEALE: When you say you have strong attitudes, when you talk about strong attitudes it's something that you believe in. Do you feel that if it was close and the evidence indicated that the case was going contrary to what your beliefs are, could you fairly put aside your beliefs and determine the case upon what the evidence and the instructions given by the Court reveal?

MS. HARNEY: Yes, sir, I do.

MR. PEALE: Do you feel that since there will be other police officers testifying in this trial that an officer's job is very dangerous and that his testimony should be more believable than any other persons?

MS. HARNEY: Yes, I do.

MR. PEALE: You do feel that. Do you think that that would prevent you from giving equal weight to the testimony given by other persons that might be contrary?

MS. HARNEY: No, sir.

MR. PEALE: If you feel that their testimony is more believable, how could you put that belief aside and fairly hear the testimony of someone else that might contradict that testimony?

MS. HARNEY: I just feel that I [Vol. II, p. 39] could objectively look at both sides. I hope I could.

MR. PEALE: Well, your hoping that you could is not adequate enough to eliminate the prospects that you might not. You have to know actually whether you're going to be able to or not, because once we get to the trial, I think in all fairness to our side of the case, that would create a problem for us.

MS. HARNEY: I'm just hoping that it would not.

THE COURT: Well, the question ultimately is can you try this case solely on the evidence and the law and render a fair and impartial verdict based only on those considerations, laying aside any others you may have by way of reservation in your mind or anything you've heard, thought, or said, and do just that, try the case fairly and impartially.

MS. HARNEY: Yes, sir. I could do that.

MR. PEALE: You feel you could. Did I see another hand? Okay.

MS. DRISKELL: My step-son-in-law is a detective for the State Police.

MR. PEALE: Your step-son-in-law is a detective for the State Police?

MS. SALYERS: I had my hand up when you were asking for relatives on jury. My husband has served on [Vol. II, p. 40] jury about two or three years ago, and my son, also.

MR. PEALE: Did they discuss their roles and function as jurors?

MS. SALYERS: No, they didn't.

MR. PEALE: Did you form an attitude in regards to jury service based on what they went through as jurors?

MS. SALYERS: No.

MR. PEALE: None whatsoever?

MS. SALYERS: No.

MR. PEALE: Let me get back to Ms. Driskell. Did you hear the questions that were asked of Ms. Harney?

MS. DRISKELL: Yes.

MR. PEALE: Did you have any problems with any of those questions?

MS. DRISKELL: No.

MR. PEALE: You would not be prejudiced? You feel fairly certain of that?

MS. DRISKELL: Yes, sir.

MR. PEALE: Mr. Glenn?

MR. GLENN: My wife recently retired from the Department of Justice.

MR. PEALE: Do you feel as a result of her employment you would give more credit to—

[Vol. II, p. 41] MR. GLENN: I would not be prejudiced to either party.

MR. PEALE: You wouldn't? You feel that you could impartially hear all the evidence and make a determination? Anyone else?

MS. DEAN: I'm a secretary for the Department of Fish & Wildlife Resources and, of course, we do have law violation cases.

MR. PEALE: Ms. Dean?

MS. DEAN: Right.

MR. PEALE: And you say you do have a law enforcement function?

MS. DEAN: Yes.

MS. PEALE: Do you feel that, or have you heard the other questions—

THE COURT: Her department has.

MR. PEALE: Her department, yes. That's what I'm saying, her department. But again. You have to work closely hand in hand with these officers of the law. Do you feel that based on some of the questions that I have asked some of the other jurors that you would have problems...

MS. DEAN: No.

MR. PEALE: ...trying this case?

MS. DEAN: No.

MR. PEALE: You do not? You [Vol. II, p. 42] certain of that?

MS. DEAN: Yes.

MR. PEALE: I think Mr. Corns stated the participants as far as his case will be. I would like to know if any of you know Mr., a man named Marion Bates, who lives here in Frankfort?

What about Mr. David Adams, I believe is his name? Any of you know a David Adams, Davey Adams?

Now, I'll ask you something now that you will be confronted with, and I would like to know whether it would pres-

ent a problem to you, whether the subject matter of this trial would make it difficult as to you being able to listen to all the evidence. Say, for instance, we have a sex crime and there might be explicit references to sexual parts, sexual acts. Would that create a problem for any of you?

We have evidence that will be presented in that regard and we would like for you to give it full consideration. Do any of you have any problem in that regard, as far as hearing explicit references to sex? Any of you feel that that would hinder your consideration of this case?

I would like to know whether any of your family members have been victims of crime, and close neighbors? Any of you personally? I take it by your silence that means no.

What about friends? Any of your close friends, even remote friends, someone that you might know and might have some sympathy for in regards to what did occur? Have any of [Vol. II, p. 43] your friends been involved in any victim of a crime or anything like that?

MR. HOGAN: I have a close friend who was a victim of assault.

MR. PEALE: Assault? Did your knowledge and involvement in that matter cause you to have any strong attitudes about violent crimes and crimes against person?

MR. HOGAN: They found him guilty.

MR. PEALE: And finding him guilty would be based solely upon the evidence of the case?

MR. HOGAN: Yes.

MR. PEALE: And the facts. And you think that you could be directed by that totally through all—

THE COURT: Well, human nature presumes that no one is favorable toward crime.

MR. PEALE: Well, we're not questioning human nature, Your Honor. We're questioning strong attitudes as to the effect of his partiality.

Have any of you ever been a witness in a trial?

Do any of you have problems with interracial relationships such that it would prevent you from impartially hearing this trial?

Did all of you hear my question? Do any of you have any problems with interracial relationships such that would prevent you from hearing the evidence impartially in this trial?

[Vol. II, p. 44] I want to ask you another question that I think's important, whether the fact that a person made a mistake would prevent you from considering the facts that will—Would it make you believe the fact that they are more likely to make another mistake at a later time?

I'll ask that again. Whether the fact that a person made a mistake at some time in the past would make you feel that more than likely he made another mistake, or she made another mistake at a later point in time?

MR. FOSTER: I think it depends on how many mistakes they've made beforehand. First mistake I don't think it would cause any problem; but if someone had a history of making similar mistakes it would be a problem for me.

MR. PEALE: Mr. Foster?

MR. FOSTER: That's right.

MR. PEALE: You think that knowledge of the fact that someone had made a mistake previously would prevent you from giving due consideration to the facts or circumstances of the supposedly second mistake?

MR. FOSTER: I'm not sure I understand.

MR. PEALE: The fact that one might have made a mistake at one time in the past and they come in and made a second mistake, I'm saying is it possible that the fact that you know of the first mistake would prevent you from [Vol. II, p. 45] hearing all the facts and circumstances of the second mistake to determine that, well, you know, they wouldn't really know what was going on?

MR. FOSTER: One mistake? Is that what that means?

MR. PEALE: Yes.

MR. FOSTER: No, that would not get in my way.

MR. PEALE: It wouldn't? Okay. Okay. It's a very involved and complicated question, but I have my reasons for stating it as I did.

Mr. FOSTER: I understand that.

MR. PEALE: Anyone else? Anyone else?

You've heard references to what is considered presumption of innocence, presumption of innocence. I would say that that means that Mike James, by the mere fact that he's

sitting here, should be presumed to be innocent. Do any of you have any problems with giving him that consideration, by the fact that he's sitting here and has been charged by the Commonwealth with a certain offense he's not to be presumed innocent by you?

Do you understand that their presumption of innocence is to be carried throughout the trial, throughout the trial, until that particular time the Court gives you the [Vol. II, p. 46] instructions and then let's you consider the question of guilty or innocence? Do any of you have any problems with that?

Do each of you understand that it is the prosecution's burden to prove that the crime was committed? It's the prosecution's burden. They have to do it.

In saying that, do you understand it is not directly the defendant's co-responsibility to prove that he didn't commit a crime, to convince you of that? Does he have to do that?

Do you not understand that the burden that the prosecution has to carry in regards to whether the defendant committed this crime or not is to a point of proof beyond a reasonable doubt?

Now, Mr. Corns said that didn't necessarily mean all doubt. I think that there are only so few absolute instances in this world and life that there are no instances where there is—Excuse me. On a few, a few specific instances where you're in a situation where you have no doubt. But the question is a reasonable doubt, one that you use your own common sense and I guess the best way to say intuition, so to speak, as to whether there's some serious question with the prosecution's case.

Do you not understand that if you do have that serious question, that is enough to reach the term of reasonable doubt? Do you not understand that? Do you not feel that if [Vol. II, p. 47] you have that, you'll promise the defense that you will not be changed from that position if you do have it? Can you not promise myself and Mike that? Can we get that kind of promise from you? Can we get that kind of promise from each of you?

Can we also get a promise from you that you will listen to all the evidence as it is presented from this witness stand and give it equal consideration? Can we have that promise?

Do any of you feel that as a result of a few things that have happened in the Frankfort community within the last year as to violent crimes that you have an obligation, a responsibility to uphold the good name of the community or that the safety of the community is at stake? Do any of you feel that you have any obligation of that nature? Do any of you feel that? Did I see a hand?

Do any of you feel that they personally have the responsibility of upholding the sanctity of womanhood or protection, or feel they have a very strong attitude about the protection of women? Do any of you feel strongly in either of those directions?

Would the fact that the victim is a government employee prevent you from impartially hearing this case in any way whatsoever? Again, I take it from your silence that no one has any problems with that.

Mr. Rohrer, would the fact that in trying this case the defendant did not take the witness stand create an [Vol. II, p. 48] inference in your mind as to his innocence or guilt?

MR. ROHRER: No, sir.

MR. PEALE: Do you feel that you would still be able to afford him a presumption of innocence that he's entitled to?

MR. ROHRER: Yes, sir.

MR. PEALE: And still consider all the evidence as it was presented from this witness stand?

MR. ROHRER: Yes, sir.

MR. PEALE: Do any of you feel that you would form a decision in this case if the defendant chose not to testify? Do any of you have any problems with that?

THE COURT: They just said they could try the case on the law and the evidence, Mr. Peale.

MR. PEALE: Well, Your Honor, again, this is one area that I think moves outside of the law and the evidence. It's one of personal attitude that there might be something to hide or that something of that nature that might be prejudicial to the defendant's case. If that's possible, I'd like to know. I think they're obligated to tell me.

THE COURT: They have said they would try the case solely upon the law and the evidence. That excludes any other consideration, Mr. Peale.

MR. PEALE: Well, Your Honor, I've finished my voire dire. Defense passes the jury.

* * * * *

[Vol. II, p. 62] The Witness, MS. DONNA K. RICHARDSON, having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CORNS:

Q. 1 State your name, please.

A. Donna K. Richardson.

Q. 2. Directing your atention to April of 1980, where did you live?

A. 270 East Main Street.

Q. 3 Is that here in Frankfort, Franklin County, Kentucky?

THE COURT: What street?

MR. CORNS: 270 East Main.

THE COURT: East Main. Is that located here in Frankfort, Franklin County, Kentucky?

A. Yes, sir.

Q. 4 What type building were you living in, Donna?

A. It was a house that had been made into three apartments.

Q. 5 Directing your attention to the date of April 23rd, 1980, will you tell us if anything unusual happened at your residence that day?

A. On the 23rd?

[Vol. II, p. 63] Q. 6 Of April, yes, ma'am, April 23rd or 24th.

A. Okay. I had a class at Kentucky State, and when I came back I realized that—I always have a light on the front porch. The light stays on all the time because I come in and go out so much, and it had been undone or it was out and when it was checked it had been unscrewed from the thing, and when you screwed it back it came back on. And the door was ajar. The door wasn't closed all the way. And when I went in nothing seemed to be bothered, so I walked

into the bedroom and my pillows were messed up; and I knew I had left my pistol under my pillow, and it was gone.

MR. CORNS: Your Honor, we'd like to have marked for identification as Commonwealth's Exhibit 1 a pistol and a box.

Q. 7 Donna, I want to ask you if you'll look at this pistol and also the box and tell us whether or not that is the pistol about which you have just testified that was taken from your premises during the burglary on April 23rd, 1980?

A. Yes, sit, it is.

Q. 8 '81. I'm sorry. Did you call the police and report this burglary, Donna?

A. Yes, I did.

[Vol. II, p. 64] Q. 9 And you gave them the serial number of the weapon that had been taken?

A. Yes, I did.

Q. 10 Directing your attention next to May the 1st of 1981, tell us what happened at your apartment.

A. It was after work and I came home from work and had walked to my bedroom, hadn't walked back to the kitchen yet, and the back door's in the kitchen. When I was getting something out of my closet I saw the curtain on the kitchen door blow up and I knew there wasn't any air that should be coming in the kitchen. When I went back and checked it, the glass was out of the door and the locks were undone, and the glass was completely out of the screen door.

Q. 11 That's out of the storm door section?

A. Yes.

Q. 12 Where was the glass from the storm door section that had been taken out, Donna?

A. I didn't go outside to look. The police officer found it out in the weeds when he came.

Q. 13 What part of the house had the intruder messed up this time when you came in?

A. Just my pillows again.

Q. 14 As far as you know, nothing was taken at that time?

A. No.

[Vol. II, p. 65] Q. 15 The pillows again, was this the same place where you had kept this gun that you just testified about that had been taken earlier?

A. Yes, sir.

Q. 16 What did you do after you found out your house and been broken into a second time?

A. My neighbor that lived in the same apartment building next door was out on the front porch and I saw him when I came in. I was real upset, so I went out and told him and he called the police for me.

Q. 17 Directing your attention next to May the 6th, 1981, tell us whether or not you went home for lunch that day?

A. Yes, I did.

Q. 18 Did you have occasion to see the defendant, Michael James, sometime during the lunch hour?

A. Yes.

Q. 19 Tell the members of the jury panel when you first saw him and what he said and what took place.

A. Well, I'd already put my sweater on to go back to work and heard a knock at the door. And I went and answered the door. It was Mike James and he said that his wife was real sick and she was having real bad cramps and that he needed me to suggest a gynecologist or somebody, a doctor or something, and [Vol. II, p. 66] I told him I could give him my doctors. and then he said, asked me if he could use the phone, and I got the number and I said sure. And his wife had told me before that she had had problems with female problems and I, so I didn't have any reason to doubt that when he said that. So I let him in to use the phone and I looked the number up and I started to dial it for him.

Q. 20 Then what happened?

A. Well, then he grabbed my mouth with his hand and I dropped the phone, and he was poking me in the side, said he had a gun, and to hang the phone up. And I missed it, so he picked it up and hung it back up on the wall.

Q. 21 When you said he came in the door, did he come in the front door or the back door?

A. Front door.

Q. 22 After the phone was put back on the hook, what took place?

A. Then he told me to do what he said or he'd kill me, and he said he was going to go across the room and close the front door, because it was standing open. And so I walked and was halfway across to the front door and I pushed it to and it did not close because it's real hard to close. And when it didn't close, [Vol. II, p. 67] he took his other hand and he shoved it to, and when he shoved it to, I guess the muscle reflex or something made the gun go off in his other hand, and just happened to be pointed at the floor when it went off. And then he got real mad because the gun went off and he said, "See what you made me do," and should I keep going?

Q. 23 Just go right ahead.

A. And then he took me back to my bedroom, which was the room between the kitchen and the living room. And he stood me by my bed and tied my hands behind my back and he put a gag on my mouth that had a knot already tied in it, and he put the knot in my mouth and tied it around my head, and the leaned me over the bed. The bed wasn't made up and he leaned me over the bed. My legs were hanging over the side and he covered my head up and all with the covers. And then he walked away, sounded like he walked back to the living room, and I heard him come back through, heard him pick up my purse because my purse makes a noise that I could tell, and he picked it up and set it on the side of the bed and he went completely through it for a long time. And he didn't take anything out of it that I know of. And then he uncovered me and said do what he [Vol. II, p. 68] said and he wouldn't hurt me, he wouldn't shoot me. So he stood me up and I had the sweater on so he pulled the hood of the sweater up over my head and started to walk back to the kitchen door, and then walked me to the front door instead, and he put me against the wall while he walked out the front door to make sure nobody was coming.

Q. 24 What happened next?

A. Then after he walked out the front door for awhile, then he pulled me along and said we were going to run across to his house and he told me not to try anything or he

would kill me. So he had me by one arm and he picked up my purse—he was still carrying it—and he took me across to his house which is real close. It's the next house. And we went in the front door there, and—

Q. 25 How far down on your face is this hood or did it go when you walked from your house to his house?

A. It hangs real far over. All I could see was the ground when I was walking.

Q. 26 Was he on the inside or on the outside next to the street when you walked from your house to his?

A. He was on the outside, hiding me.

Q. 27 Go ahead, please.

A. So when we got over there, he stands me in the [Vol. II, p. 69] middle of the floor and says not to move, and he looks out his window to see if anybody saw us. After he looked out his window he took me back to his bedroom and then untied my hands and took my gag off and told me not to do anything or he would kill me. And then he told me to take my sweater off. I did that and then he told me to take my clothes off, and not to say anything and not to turn around. And I did that.

Q. 28 You took all your clothes off?

A. Yes.

Q. 29 What next occurred?

A. And then I guess he took his clothes off. He was standing behind me. I couldn't see. And he went and got a towel and laid it across the bed and told me to get up on the towel, and then, then he got up there.

Q. 30 Tell us whether or not, Donna, at that time he engaged in regular sexual intercourse with you?

A. Yes, he did.

Q. 31 After this act was completed, what did he do next?

A. Well, he got up and sat on the bed for awhile, and I asked to get dressed and he said no. And so I had to just sit there for a long time, and I finally told him I was cold and he said I could go ahead [Vol. II, p. 70] and get dressed. After I put my clothes on, then he told me he wanted me to get washed. So he took me to the bathroom, gave me a washcloth and towel, and told me to wash up. And I

washed up out of the sink and put my clothes back on. And then he sat on the end of the bed for a long time and he didn't know what, he said he didn't know what to do with me and he just sat there. And so then he walks back to the living room and had me go in there and sit down in the middle of the floor, and he kept looking out the window and I was trying to convince him to let me go, that I wouldn't tell anybody and just coming up with all kinds of excuses. And I thought maybe that his wife would come home soon, and I was saying, you know, "You should leg me go before your wife comes home," and when the bus went by he said, "She's working late." And so then he finally decided to let me go, and I told him I wouldn't tell anybody and that my father knew I had a second gun and that I wouldn't be able to explain it being missing unless I had it back. So he gave that back to me in my purse when he handed me my purse, and then let me go ahead and leave after I sat there for a long time.

Q. 32 Do you have any idea how long you were over at his [Vol. II, p. 71] house, Donna?

A. Well, I was leaving to go back to work from lunch at 12:30 and when I got back to work it was a little bit after four.

Q. 33 Did you go immediately from his place and get in your car and then to work?

A. Yes, I did.

Q. 34 So most of that time you were over at his place?

A. Yes.

Q. 35 What, if anything, did he say about the attic while you were at his place?

A. Well, he said he didn't know what to do with me and he said he guessed he could put me in the attic, and I was just trying to make a joke out of it so he wouldn't think I was really worried or anything; and I said well, I'd starve to death up there and he just said no. And then I said something about I'm scared of spiders and he said there weren't any spiders up there. So I just dropped it and kept trying to think up excuses for him to let me go.

Q. 36 Did you make any physical resistance of his advances there at his apartment or not?

A. No. I was afraid to.

Q. 37 Did you know his last name at this time?

A. No.

[Vol. II, p. 72] Q. 38 What happened when you got back to work some time after four?

A. Well, I was real upset and I didn't know what I was going to say when I got there. I went into my boss's office and he saw that I was real upset and he knew that I had already had one break-in earlier, and he said, started asking about that, if anything happened. And then I told him what happened and he said I had to call the police and he got really mad when I told him I was scared to call the police because if they didn't catch him I was scared he would kill me first. And he got really mad, so I just went ahead and left.

Q. 39 After you left, did you then meet with one or two of your friends?

A. I went over to my girlfriend's house.

Q. 40 Shortly thereafter did you then go call the police or someone call the police?

A. Yes.

Q. 41 Where did you go after the police were called that evening, Donna, next?

A. After the police were called?

Q. 42 Yes.

A. To the hospital.

Q. 43 You went out to King's Daughters Memorial Hospital?

[Vol. II, p. 73] A. Yes.

Q. 44 Were you examined out there and tests conducted on you by a doctor and a nurse?

A. Yes.

MR. CORNS: We would like to have marked for identification as Commonwealth's Exhibit #2 what appear to be two cloth strips.

Q. 45 Donna, would you look at these two strips and tell us whether or not, as best you can tell, they appear to be the strips that were used to tie and gag you on the date in question?

A. Yes, they do.

MR. PEALE: Your Honor, I notice that there is another officer here. I don't know if he's—

THE COURT: Are you expecting to testify in this case?

THE OFFICER: No, sir, I'm not.

MR. PEALE: Okay.

Q. 46 After you were examined at the hospital, Donna, did that conclude your association with the police officers that day? That was the last contact you had with them that day?

A. Yes.

MR. CORNS: We have no further [Vol. II, p. 74] questions, Your Honor. Please anser Mr. Peale.

THE COURT: You may ask, Mr. Peale.

CROSS EXAMINATION BY MR. PEALE:

Q. 1 Ms. Richardson, how long had you lived at your 270 East Main residence?

A. Up until the time of the incident or the time I left?

Q.2 When did you first move in and how long had you been there?

A. I moved there in January.

Q. 3 In other words, the first part of the year, January, 1981?

A. It was the first of the year sometime. I'm not sure it was in January exactly.

Q. 4 You're not sure. What time did Mr. and Mrs. James move in?

A. They were already there.

Q. 5 They were already there when you moved in?

A. As far as I know.

Q. 6 So still around the first of the year; right?

A. Yes.

Q. 7 Exactly how are these houses situated in this area? [Vol. II, p. 75] (Counsel drawing on the blackboard) I'm not much of an artist. Supposedly, this is East Main Street. Let that be 270, and this would be your apartment. Now, there are two sides to your apartment; is that not correct?

A. There's three apartments there.

Q. 8 But you have what, a front entrance?

A. And a back entrance.

Q. 9 So the entrance to your apartment would be on this side over here or this side here?

A. On the right, as you're facing it.

Q. 10 Right here? And then you have, as you say, a back entrance. How are the other apartments located in this building?

A. I'm not real sure about all the doors. There's one—

Q. 11 Is there one on the same level as your apartment?

A. They're all on the same level.

Q. 12 They're all on the same level. But your apartment goes from front to back?

A. Yes.

Q. 13 So let's say for, just hypothetically, this apartment is divided into two separate apartments. Who lives in this apartment?

A. A man by the name of Richard Lawrence.

Q. 14 What's his name?

[Vol. II, p. 76] A. Richard Lawrence.

Q. 15 Richard Lawrence. So I'll just say R. Lawrence. Who lives here?

A. I don't know.

Q. 16 Just say unknown, UNK for unknown. Where does Mr. James live in relation to your apartment complex?

A. In the house next door.

Q. 17 Which side of that house did he live in?

A. The left.

Q. 18 This one? Do you know how many apartments there are in this house?

A. That's the only one I've seen.

Q. 19 And basically, there are other houses up and down East Main Street; right? So this would be, if I'm not mistaken, 268. There's a house here next to your; right?

A. Yes.

Q. 20 Okay. Now, do you know who lives here?

A. My landlord.

Q. 21 Generally at home?

A. No. She was old and they had to keep taking her out for a lot of things.

Q. 22 She's ill, in other words?

A. Yes.

Q. 23 Okay. Now, who lives down here?

[Vol. II, p. 77] A. I don't know.

Q. 24 You don't know? Have you had the occasion to walk up and down East Main Street?

A. No.

Q. 25 Is it not your testimony that you and Mr. James walked from your apartment down East Main Street to his apartment?

A. We walked through the yard. We didn't walk out on the road.

Q. 26 Through the yard?

A. Yes.

Q 27 How would you characterize East Main Street during the noon hour as to traffic?

A. That day?

THE COURT: On that day.

Q. 28 That day, yes.

A. I didn't hear any cars pass. I couldn't see, but I didn't hear any.

Q. 29 So you couldn't see? Were you blindfolded?

A. No. The hood of my sweater came down too far.

Q. 30 What was the weather that day?

A. It must have been cool because I was wearing my long sweater.

Q. 31 You had worn this sweater to work?

A. Yes.

[Vol. II, p.78] Q. 32 Is it not your usual habit to then come home for lunch? Are you a student or were you a student at Kentucky State University, also?

A. Part-time. I only had one class up there.

Q. 33 You went to class in the evening?

A. Yes, sir.

Q. 34 Now, you stated on direct that to your recollection the gun that was presented into evidence was taken on April 23rd. Did you report that burglary?

A. Yes.

Q. 35 You did, personally?

A. Yes.

Q. 36 When?

A. Okay. It was taken, it was late when I got back that night and I didn't have the serial number on me and I knew my father either had it or he knew where he had gotten it; so I waited till the next morning and called him and had a friend stay with me that night because I was a little bit scared. And when I called my father the next morning, he called the store where he had gotten it and got the serial number; and as soon as I got the serial number from him, I called the police.

Q. 37 And this was the next day that you reported the accident—I mean, the incident?

[Vol. II, p. 79] A. It was early the next morning.

Q. 38 Early the next morning. Now as far as—Did the officers come out and investigate this?

A. Yes.

Q. 39 Now, how did you know that your house had been broken into on the 23rd?

A. Because I'm always sure to lock the door and the door was ajar when I went to open it. And the light was out, and it wasn't burned out; he had just been loosened.

Q. 40 And how are you saying entry was gained into your house?

A. I hadn't noticed it until the police officers found it the next morning; but the front window had been opened. And by being on East Main, there's a lot of dirt on the front of the house, and on the windows, and the dirt had been knocked off the outside of the window where they had opened the window and so we think that's how they got in.

Q. 41 In other words, there was no real evidence of entry?

A. There was no fingerprints that could be taken.

Q. 42 But no sign as to how the person really got in the house; right?

THE COURT: Said there was an open window.

[Vol. II, p. 80] Q. 43 MR. PEALE: No. She said they saw that and they thought that might be. They did not—

A. Well, it was—Like, the windows push out. There's hinges on top that push out and raise up, instead of sliding up and down. And it had been pushed out and hadn't been pushed back up, closed. It was still out a little bit.

Q. 43 Now, did any other person have access to your apartment?

A. No, sir.

Q. 44 No boyfriends with a key or anything?

A. I had the only key.

Q. 45 Now, as far as May 1—No. Let me go back to the 23rd. You say when you returned home, you said the door was open and that the light on the porch was out?

A. Yes, sir.

Q. 46 Had it, did it appear to be screwed out or just turned off?

A. Screwed out, because the switch always stays on; and when the light bulb was turned in its socket, it came back on.

Q. 47 So if it was the question of entry through the window into the house, you presume that they left [Vol. II, p. 81] out of the front door, and as they were leaving the screwed the light out on the porch?

MR. CORNS: Your Honor, we don't know when they screwed the light out.

THE COURT: Well, she can answer. He asked her if she assumed that. She may assume it, and she may not.

Q. 48 You testified the light was always on. Was that not your earlier testimony?

A. Yes. The light always stays on. But I assume that they did it before they entered the window, if that is the way they got in.

Q. 49 Did that before they entered the window. How far is the window from the porch?

A. It's on the front porch.

Q. 50 The window is on the front porch?

A. Yes.

Q. 51 It's on the front porch?

A. It comes out onto the front porch.

Q. 52 Oh, okay. Now, you testified that you were not familiar with Mr. and Mrs. James, and you testified earlier that you knew Mr. Lawrence. Is that not correct?

A. That's true.

Q. 53 Was Mr. Lawrence home on each of these occasions?

[Vol. II, p. 82] Like on April 23rd?

A. No, he wsn't home when I got there.

Q. 54 Was he home on May the 1st?

A. No.

Q. 55 What about May the 6th?

A. May the 1st he was; May 6th he wasn't.

Q. 56 Okay. Now, as to the May 1st incident, when was this reported to the police?

A. As soon as I found the door had been broken into.

Q. 57 You promptly called the police and reported to them this incident?

A. No. That's when Richard was standing out on the porch and I walked out and told him and he called them for me.

Q. 58 In other words, he called them for you?

A. Because I was real upset; yes.

Q. 59 You were real upset. Was it at your request?

A. Yes.

Q. 60 Now, did the officers come and investigate this incident?

A. Yes.

Q. 61 And this was when the entry was through the rear door and this was when the screen and the window pane had been removed and the fingerprints was found?

[Vol. II, p. 83] A. Yes.

Q. 62 Now, during any or either or these times had Mr. or Mrs. James been to your house?

A. Yes. They'd stopped by together a couple of times, I think.

Q. 63 When?

A. I don't remember the exact day.

Q. 64 They were together?

A. Yes.

Q. 65 How long did they stay?

A. Not very long. I had another neighbor on up the road that was there at the time they stopped by, too, once. And then they stopped by, my neighbor up the road was

helping me nail the windows down after the first break-in. They stopped by then, and then they stopped by one night when I was there by myself. But his wife had stopped by a couple of times while I was there just to use the phone for pizza.

Q. 66 And all she did was use the phone for pizza?

A. Then she left.

Q. 67 Now, this other time that they stopped right around the burglary, did you say you were nailing windows down or—

A. Yes, because I hadn't, I guess, paid enough [Vol. II, p. 84] attention to the windows and then after we found that one had been opened, we nailed them all down.

Q. 68 Did they assist you in that?

A. No.

Q. 69 Did the Jameses assist you in that?

A. They just came over asking what had happened.

Q. 70 Was there a lot of commotion in your house at that time, other people?

A. No.

Q. 71 Coming and going?

A. Nobody else was there.

Q. 72 What about any time, any other times? You've been there, what, maybe three or four months before these incidents occurred. Had you and the Jameses had any direct contact other than the times that you mentioned now?

A. No.

Q. 73 Now, I just want to know, based on your testimony, when did Mrs. James tell you she was having female problems then?

A. One time when she came over to use the phone, the line was busy and we talked briefly while she was waiting to call again; and she said she was just recently having some problems.

Q. 74 Just out of the clear blue sky she said that. She [Vol. II, p. 85] didn't know you, did she?

A. No. I'd been doing some exercises and when she came over she asked if I was busy and I don't know, she, somehow we got off on that subject; but she wasn't there very long.

Q. 75 What else did you talk about?

A. Nothing in particular.

Q. 76 Well, don't you think it's a little bit personal to just up and, not knowing a person, bring up such a subject?

THE COURT: She didn't bring it up. No, I say for Mrs. James to bring it up, such a subject.

THE COURT: She didn't know the woman. She didn't know if it was unusual or not.

Q. 77 Weren't you a little surprised that she would talk to you in this manner?

A. She didn't go into a whole lot of detail.

Q. 78 But she told you she was having female problems?

A. Something to the effect she'd been having a lot of pain, cramps or something, and wasn't feeling well.

Q. 79 Was Mr. James present at that time?

A. No.

[Vol. II, p. 86] Q. 80 How do you explain his knowing and using that reason as the basis for getting into your apartment on May 6th?

A. I don't know, unless she'd told him about it.

Q. 81 About telling you about her female problems?

A. Well, she probably, I don't know—Maybe she mentioned it to him when it was bothering her.

Q. 82 On May 6th when you went from your apartment down to Mr. James' apartment, did you see anyone in particular along this street?

A. No.

Q. 83 That you might see—How is this generally? Are there cars parked up on East Main Street and things of that nature?

A. Occasionally. If somebody's home they usually have to park out front. Not that many houses have driveways.

Q. 84 Now, do you or are you aware of the fact that there might be persons who usually are out on this street and around this area constantly? Or had you not noticed that?

A. Yes. I've seen people walk by occasionally.

Q. 85 But not generally, say be constantly present at any of those residences along that area of the street?

[Vol. II, p. 87] A. I've seen people sit out on their porches at times.

Q. 86 Did you see anyone sitting on the porch on the day of May 6th?

A. No, but I couldn't see very far because of the hood. When we walked out he said, "Come on while there's nobody out here."

Q. 87 So in other words, there was nobody out there according to your statement. You didn't look to see them.

A. I couldn't see.

Q. 88 Were you blindfolded?

A. No. My hood was down too far. All I could see was right up so high. I can bring the sweater if you would like.

Q. 89 No. I'm just asking you you could not raise your head and see or were you holding your head down?

A. Well, my head was about normal, I guess.

Q. 90 Well, then would it not be more correct to say that you didn't look to see if anybody was out there?

THE COURT: She said she couldn't see because her hood was down over her eyes.

MR. PEALE: Well, my question is did she look or not.

THE COURT: Tell him if you looked or not.

[Vol. II, p. 88] A. I looked where I was walking. That's about all I could see.

Q. 91 But you didn't look to see if anyone was out in the street?

A. The only way to do that would be get the hood off.

Q. 92 You didn't feel that there might be someone out there that could render you assistance in this matter?

A. I didn't figure he'd be walking out there if there was somebody standing around.

Q. 93 Now, you upon reaching Mr. James' home, had you been to his house before?

A. No.

Q. 94 You've never been to his house?

A. No.

Q. 95 Was there not a fire at the James apartment?

A. Yes, there was.

Q. 96 When did this occur?

A. I don't remember the exact date. It was late at night and I had a friend at the time, and Mike's wife—I don't remember her name—came over and said, asked if we could help get some stuff out of their apartment, that there was a fire. So she went on back over and we left and went to help, and—

Q. 97 You left and went where to help?

[Vol. II, p. 89] A. Across the yard to help move some stuff out.

Q. 98 Over where?

A. To his apartment.

Q. 99 So you had been in his apartment.

A. But I did not go in. I stayed outside and the friend that was with me went in and helped him carry out a stereo.

Q. 100 So you stayed outside this apartment all this time?

A. Yes.

Q. 101 Did you not look into the apartment?

A. You couldn't really see the way the doors were from standing outside.

Q. 102 How long were you over there?

A. Well, after the moved the stereo out, I guess we stood there in the yard then until the fire department said it was okay, and I think he helped him carry the stereo back in.

Q. 103 This was prior to May 6th, was it not? Prior to May 1 even?

A. I don't know exactly.

Q. 104 You don't know exactly when it was or you don't know exactly whether it was before May 6th or after May 6th?

A. No. I couldn't say.

Q. 105 Do you think that if it was after May 6th in which [Vol. II, p. 90] you had charged this man with rape you would have been going over to his house to assist him?

A. I guess it would have to be before that, because I left there right after that.

Q. 106 Thank you. Now, when you were at Mr. James' home on this day, you said that—What time did you first go over there? What time did he come to your house?

A. He knocked on the door about 12:30 because that's what time I left to go back to work, a little bit before 12:30.

Q. 107 So it had to be what, around 12:30 or—

A. Probably about twenty-five after twelve.

Q. 108 How long did you say he stayed over in your house before you left there going to his apartment?

THE COURT: Just your best estimate.

A. About fifteen minutes.

Q. 109 About fifteen?

A. Maybe twenty.

Q. 110 So that would make it 12:40 to 12:45 that you went from your apartment to his apartment. Now, do you have a watch? Do you wear a watch?

A. Yes.

Q. 111 You have a watch but you don't wear it?

A. I have a watch, but it was broken.

Q. 112 Now, you stated that you went to Mr. James' house, [Vol. II, p. 91] but you were, you remained there for awhile until what, around four o'clock?

A. Yes.

Q. 113 Could it have been earlier or later?

A. It only takes me about five minutes to get to work, and it was about maybe around five or ten minutes after four when I reached work.

Q. 114 When you reached work. Now, you said while you were at your home and while you were at Mr. James' home he threatened you several times?

A. Yes.

Q. 115 With physical harm; with death even. Is that not correct?

A. Yes.

Q. 116 And you said that you had talked with him for a certain period of time trying to persuade him to allow you to leave peacefully?

A. Yes.

Q. 117 And you said that upon leaving, Mr. James gave you back the other weapon that you had. Is that not correct?

A. That's true.

Q. 118 Did you ever recognize the weapon that he had in his possession at first as being your weapon, as being your firearm, the one that was taken from [Vol. II, p. 92] you?

A. The one that he pointed at me?

Q. 119 Yes.

A. I noticed that it was a black pistol. I didn't check the serial number.

Q. 120 But you didn't recognize it as being the gun that was supposedly taken from your apartment?

A. It looked like a small, black pistol.

Q. 121 That's the extent of it?

A. Yes. I just like saw it a couple of times, not for a long length of time.

Q. 122 Now, I need to again trace—Let me ask you this. You said you did know Mrs. James. Is that not correct?

A. Not real close. I knew her.

Q. 123 But you were more or less acquaintances and did talk, converse?

A. Yes.

Q. 124 Did you feel that the reason that she was more at ease with you was because she was also Caucasian?

A. I don't think that would have made any difference to her.

Q. 125 Now, upon leaving Mr. James, what exactly did you do?

THE COURT: Hasn't she already [Vol. II, p. 93] testified to that? She said she went and got in her car and went on to work.

MR. PEALE: She testified to part of it, but Mr. Corns sort of—

THE COURT: She's testified for you on cross a couple of times about it already.

MR. PEALE: Well, no, she hasn't, Your Honor. I asked her upon leaving Mr. James what did she do and she says she went to work.

THE COURT: Got in her car and went to work. She's testified to that two or three times.

MR. PEALE: Well, I want her to go over it again.

THE COURT: Well, I don't want her to do it again. That's enough.

MR. PEALE: Well, Your Honor, I think it's important—

THE COURT: If you have a different direction, you're welcome to take it; but you're not going to ask that again.

MR. PEALE: Your Honor, I think it's imperative to the defense that we trace—

THE COURT: Mr. Peale, I have ruled [Vol. II, p. 94] on it. It is not to be asked again.

Q. 126 Well, let me ask you this. Why did you not call the police immediately after leaving Mr. James' home?

A. Because I was scared that he would kill me, because if they didn't find him before he found me; and I was just too afraid.

Q. 127 Did you not think that the police would protect you?

A. I just left. After having a gun held on me for several hours I was too much afraid from his threats.

Q. 128 His threats, but he wasn't around you at this time. Right?

A. That's correct.

Q. 129 Did you not feel that the police would protect you if you would have reported it?

A. I don't know.

Q. 130 What time did you report this incident to the police?

A. About maybe seven, six or seven, eight.

Q. 131 Six, seven, or eight. You don't know?

A. It was whatever time I went to my friend's house and they talked me into calling the police.

Q. 132 What time was that then?

A. I don't know. It was after it had already started [Vol. II, p. 95] to get dark.

Q. 133 Was this the second or third stop that you made after leaving Mr. James' house?

A. It was the second; no, third. First I went to a girlfriend's house and then I went to the friend's house that I called from.

Q. 134 You never called the police during any of this?

A. No.

Q. 135 So some four to five hours after leaving Mr. James' home that you reported this incident to the police. Did you call?

A. No. My friend called.

Q. 136 Are you positive that during this act of intercourse Mr. James penetrated you and ejaculated in you?

A. I'm positive that he penetrated. I'm not sure about the other.

Q. 137 Did you go with the police to the hospital for your examination or did you go by yourself?

A. The friend's house I was at went with me, and the police, I think they followed or they led. I'm not sure which, in the police car.

Q. 138 In the police car.

MR. PEALE: No further questions.

MR. CORNS: Nothing on re-direct, Your Honor.

* * * * *

[Vol. III, p. 4]

* * * * *

The witness, MR. SCOTT CLARK, having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CORNS:

Q. 1 State your name.

A. Scott Clark

Q. 2 Where are you employed?

[Vol. III, p. 5]

A. Frankfort Police Department.

Q. 3 How long have you been employed with the Frankfort Police Department?

A. Ten years.

Q. 4 Were you so employed in the calendar year 1981?

A. Yes, sir, I was.

Q. 5 In your capacity as a representative of the Frankfort Police Department, did you have occasion to visit the premises of one Donna Richardson at 270 East Main Street here in Frankfort last spring?

A. Yes, I did.

Q. 6 Tell the members of the jury panel when you went there and the purpose of your trip?

A. We received a call from Donna Richardson stating that her premises had been broken into. Officer Jerry Best got the initial call and he went to the premises. I went to the scene to see if I could provide any assistance. When I arrived, we noticed that the back door had been opened and that someone had entered the apartment. Entry was gained by removing a bottom panel, glass panel, out of a storm door. Once it had been removed, the storm door had been opened and a small window pane in the back door leading to the house had been broken out, and someone reached in and unlocked the [Vol. III, p. 6] door.

Q. 7 What day was this, May 1st, 1981?

A. Yes, sir.

Q. 8 Approximately what time did you arrive on the scene, Officer?

A. It was around four o'clock.

Q. 9 Did you find the portion of the storm door about which you've just testified being removed?

A. Yes, sir, I did.

Q. 10 Where did you find that?

A. I found it behind the porch that is located behind the house, beneath the porch in some bushes.

Q. 11 What did you do when you found this portion of the storm door?

A. I took the window pane back on the inside and dusted it for fingerprints.

Q. 12 What did you find?

A. I found one latent print four inches from the edge of the inside glass.

Q. 13 It was on the inside of this portion of the glass?

A. Yes, sir.

Q. 14 What did you do with the latent fingerprint which you lifted from that section of the storm door?

A. I attached it to an offense report and gave it to Detective Courtney.

[Vol. III, p. 7] Q. 15 That's Robert Courtney?

A. Yes.

Q. 16 Frankfort Police Department?

A. Yes, sir.

Q. 17 Are those premises located in Frankfort, Franklin County, Kentucky?

A. Yes, sir, they are.

MR. CORNS: No further questions. You may ask.

CROSS EXAMINATION BY MR. PEALE:

Q. 1 Office Clark, did you find any other fingerprints on this glass?

A. No, sir. That's the only one that I found.

Q. 2 Did you dust around the back door and other areas?

A. Just the one glass.

Q. 3 You did not dust anywhere else?

A. I did dust the doorknob on the inside.

Q. 4 Now, you said this latent print that you found was on the inside portion of the glass?

A. Yes, sir.

Q. 5 When you say on the inside portion of the glass, does that mean that it was on the inside portion of the glass that was facing the door or what?

[Vol. III, p. 8] A. Yes, sir. It's the side of the inside of the house, if the window ws put back into the storm door.

Q. 6 So in other words, the person had gained entry to touch that portion of the door?

A. Yes, sir.

Q. 7 Was there a sign of forced entry at that point?

A. Not on the storm door, no.

Q. 8 Are you therefore saying there was no prints on the outside portion of the door?

A. Not that I found.

Q. 9 So your testimony then would be correct that the door was removed from the outside to gain entry?

A. Yes, sir.

MR. PEALE: No further questions.

RE-DIRECT EXAMINATION BY MR. CORNS:

Q. 1 Are you saying that the door was pushed in?

A. Yes, sir. The glass had been pushed in.

Q. 2 After the glass had been pushed in, tell us whether or not it would be possible to reach up and unlock the storm door?

A. Yes, sir, it would be.

Q. 3 After the storm door was opened, what did you say [Vol. III, p. 9] appeared to have happened to the glass in the regular door?

A. It had been broken out.

MR. CORNS: That's all the questions I have.

RE-CROSS EXAMINATION BY MR. PEALE:

Q. 1 On re-direct, you're saying that the door was pushed in, but the latent print that you lifted was on the inside part of the glass door?

A. Yes, sir.

MR. PEALE: No further questions.

MR. CORNS: That's all.

* * * * *

WITNESS EXCUSED

* * * * *

[Vol. III, p. 10]

The witness, MR. JOHN M. SPARKS, JR., having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CORNS:

Q. 1 State your name, please.

A. John M. Sparks, Jr.

Q. 2 Where are you employed?

A. I'm a trooper with the Kentucky State Police here in Frankfort.

Q. 3 How long have you been employed at Post 12 here in Frankfort?

A. Seven years.

Q. 4 Were you so employed during the calendar year 1981?

A. Yes, sir, I was.

Q. 5 Officer Sparks, in your capacity as a member of the Kentucky State Police assigned to Post 12 here in Frankfort, did you hve authority, occasion to investigate a complaint made by Donna Richardson on or about May 6, 1981?

A. Yes, sir, I did.

Q. 6 Approximately what time did you get the call?

A. It was approximately six p.m. on that day that we received a call from Donna Richardson that she'd been the victim of a rape here in Frankfort.

[Vol. III, p. 11] Q. 7 When you received this call what did you do?

A. I responded to the address given me and interviewed the victim as to what had taken place, circumstances involved. After that was taken care of, we then went to the King's Daughters Hospital.

Q. 8 What was the purpose of the trip to King's Daughters Hospital?

A. To have an examination done by a doctor reference to evidence collection.

Q. 9 Was this examination conducted?

A. Yes, sir, it was.

Q. 10 Tell us whether or not any blood samples were taken in your presence by the nurse, Ms. Cheshire?

A. Yes, sir. As myself and a detective were interviewing the victim, the nurse on duty, Ms. Cheshire, took a blood sample from the victim and then gave that blood sample to me for my possession.

Q. 11 She took the blood sample from Donna Richardson and gave it to you?

A. Yes, sir, she did.

Q. 12 What did you do with the blood sample taken from the victim?

A. I transported it to my cruiser parked outside the King's Daughters Hospital entrance and locked it in the cruiser.

[Vol. III, p. 12] Q. 13 What was next done with that sample as far as you know?

A. It was kept in my possession until the next day when I signed it over to Detective Owen of the Kentucky State Police at the lab, Post 12.

Q. 14 Is that Detective Claude Owen?

A. Yes, sir, it is.

Q. 15 After the visit to King's Daughters Hospital and the tests being made there, what did you do with reference to this incident?

A. After we left the hospital?

Q. 16 Yes.

A. Myself and Detective Owen and Detective Courtney of the city police furthered our investigation after we learned the alleged perpetrator's name, by going to the perpetrator's home to see if he was there.

Q. 17 So you went to the home of Michael James?

A. Yes, sir, we did.

Q. 18 What did you find upon arrival at this house?

A. Found that he was not at home. His wife was home. She told us that she was at Kentucky State refereeing a basketball game. So Detective Courtney, myself, and Detective Claude Owen, proceeded on to Kentucky State.

[Vol. III, p. 13] Q. 19 What did you find when you got to Kentucky State?

A. We walked in the front entrance of the gymnasium there and observed the defendant. He was on the court refereeing a basketball game. It was an intramural, inter-squd game. It was not a regular, scheduled game by Kentucky State. We at that time waited till the game was about over. We saw the defendant walk over after the game was over and picked up a duffle bag. As he was exiting the building, we then went up and confronted him and identified ourselves as to who we were, told him we had a warrant for his arrest.

Q. 20 When had you obtained a warrant for his arrest?

A. After we learned his name, we then contacted the district judge who issued the warrant for his arrest.

Q. 21 You contacted Judge Crittenden and got a warrant?

A. Yes, sir, we did.

Q. 22 And you took that warrant to his house and then on to the Kentucky State gymnasium?

A. That is correct.

MR. CORNS: Your Honor, we move to have marked for identification Commonwealth's Exhibit #3 what appears to be a blue and white duffle bag.

[Vol. III, p. 14] Q. 23 Trooper Sparks, would you please look at what has been marked as Commonwealth's Exhibit #3 and tell us whether or not that is the duffle bag which was taken from the defendant in your presence at the Kentucky State University gymnasium on the evening of May the 6ath?

A. Yes, sir, it was. The first rule of an arrest is to, anything, if it's a lady and she has a purse, the first thing is to take that from his possession for your own safety, and that is the bag he had.

Q. 24 You or someone in your presence took that from him as he exited the K.S.U. gym?

A. I took it from him and placed it in the front seat of my cruiser.

Q. 25 What then occurred with respect to the police officers and the defendant?

A. We then placed Mr. James in the back seat of my cruiser and read the warrant to him, explained to him the situation why we were there, why the warrant was obtained, then asked him for permission to search his residence for any evidence we might find. He would not consent to a search. So we then transported Mr. James to the city police station where Judge Crittenden was there, explained to him the situation that evolved since we spoke [Vol. III, p. 15] with him last, and he issued a search warrant for his premises at that time.

Q. 26 At what time were the rights of the defendant given to him?

A. Detective Owen read the rights to him in the back seat of my cruiser immediately after the arrest.

Q. 27 This was on Kentucky State University campus?

A. In the parking lot at Kentucky State University. And then Detective Courtney also reiterated those rights

to him at the police station during the time he was being photographed and prints were taken.

Q. 28 So when you got back to police headquarters he was photographed and fingerprinted?

A. He was again advised of his rights.

Q. 29 And you obtained a search warrant from Judge Crittenden?

A. Yes.

Q. 30 After you and the other officers obtained the search warrant what next took place?

A. We then proceeded back up to the residence of Mr. James and his wife was still there. We told her we had a search warrant for his residence, all areas of the apartment that were written on the warrant. She consented fully to our—She gave us no problem at all. We conducted a search of the [Vol. III, p. 16] house, gathered whatever evidence we needed, and then I had to return to my cruiser to get some more evidence bags.

Q. 31 You might explain what is the purpose of evidence bags?

A. Each piece of evidence is securred that is seized in a search warrant or fruits of a crime, has to be labeled individually as to time and place where it was found, and it cannot be gathered and thrown into one heap. It has to be gathered individually, and it took a lot of bags and so forth to put all the evidence in that we collected.

Q. 32 What happened when you went back out to the car to get some additional evidence bags?

A. I had to move the bag that was sitting in the front seat and in picking the bag up on the underside of it, I felt an object in the bag that appeared to be a gun.

Q. 33 What did you do with the bag and its contents?

A. We then took the bag and the contents inside the house, opened up the bag at that time, and found the gun in the bottom part of the bag, found a gun in the bottom of the bag.

Q. 34 I'll ask you to examine what has been previously marked for identification as Commonwealth's Exhibit [Vol. III, p. 17] #1, and tell us whether or not that is the pistol

that you found in that blue duffle bag when you opened it at the defendant's residence on the night of May 6th, 1981?

A. Yes, sir. That was the same gun that we did find. At that time I copied the serial number down off the gun. We did not handle it. I copied down the serial number, went out to my cruiser, checked the serial number into our National Crime Information Center, which is a data bank concerning all stolen property and so forth, and the came back it was stolen in Frankfort, Kentucky and originating agency that put the gun into the computer was the Frankfort Police Department. It coincided with the date of entry of the May burglary, on the previous burglary.

Q. 35 That was the gun that was reported stolen by Donna Richardson on the 23rd of April?

A. Yes, sir, it was.

Q. 36 Did the defendant make any sort of a statement concerning how he came to have this weapon in his possession at this particular time?

A. No, sir. After advising the defendant of his rights, he did not make any statement whatsoever regarding anything.

[Vol. III, p. 18] Q. 37 What else, if anything, did you find in the duffle bag, Officer Sparks?

A. We found some white strips of cloth, the ones that have been admitted as evidence earlier, that coincided with the type of cloths that Ms. Richardson had stated to us earlier that she'd been bound and gagged with. That was the two primary pieces of evidence that we were looking for in the house.

Q. 38 Tell us whether or not one of those rags, at the time you found it and prior to it being examined and a portion cut out by the lab technician, if one of them had a knot tied in the middle of it?

A. Yes, sir, it did.

Q. 39 What was done with the strips that you found in this duffle bag?

A. The strips, the gun, all contents that we seized for evidence, were labeled and marked and returned to my cruiser, and locked. And the next day they were all turned over to Detective Owen at Kentucky State Police and he in turn turned them over to Mr. Ed Taylor, the Kentucky State Police lab.

Q. 40 Was Detective Owen the one that was assigned to work this particular case?

A. Yes, sir. He drew the case number.

Q. 41 And that's why you turned all these things over to [Vol. III, p. 19] him?

A. Yes, sir.

Q. 42 What next took place, Officer Sparks?

A. After which event?

Q. 43 After you had found these items in the duffle bag.

A. Well, we then completed executing the search warrant in the defendant's home, and then proceeded next door to process the victim's home for prints, any evidence we might find there.

Q. 44 What, if any, evidence was found in the victim's home?

A. We dusted several pieces or items in the home with no luck as far as gaining any type of comparison or any type print. However, we did find a lead bullet that had been smashed that was laying on the floor in the general vicinity of the doorway. The bullet had what appeared to have ricocheted off the interior wall by the door. It had made a slash mark down the wall and was laying on top of the hardwood floor and—

Q. 45 And it was in a smashed condition?

A. It was a busted up piece of lead.

Q. 46 What then took place as far as you were concerned, Trooper Sparks?

A. As far as the investigation that night, it was [Vol. III, p. 20] pretty much after we processed the victim's residence and we locked her house and the landlord came over and we securred her premises for the night because she was not going to be staying there. I, in the custody of all

the evidence, drove home to my residence where I went off-duty for that night.

Q. 47 You've testified the evidence was locked that night in the trunk of your cruiser?

A. Yes, sir. It was at my residence.

Q. 48 What was done with the evidence the following day?

A. I then, when I came to work early the next morning, I met Detective Owen on post, the Kentucky State Police Post located on the Louisville Road. Our crime lab is adjacent to the, it's in the same building and adjacent to the post. I pulled my cruiser and backed it to the front lab door and had a lab technician standing by to receive all the evidence. Detective Owen then took all the evidence out of my cruiser, itemized it, and turned it over to Mr. Ed Taylor in the lab, and he itemized it and signed for it.

Q. 49 After the defendant had been advised of his rights, what, if any, statement did he make concerning the duffle bag?

[Vol. III, p. 21] A. We did ask him about it after we found the gun and checked and it had been stolen, the gun that was in his possession. His only statement he made was he didn't know where the gun came from, that somebody gave him the bag, that he had no knowledge of the bag or the gun.

Q. 50 Did that conclude basically your investigation of this case?

A. That was basically my investigation, yes.

MR. CORNS: You may ask.

CROSS EXAMINATION BY MR. PEALE:

Q. 1 Detective Sparks?

A. Trooper Sparks.

Q. 2 Trooper Sparks, you said you received a call in regards to this which reported the alleged rape at six p.m. on the evening in question?

A. Yes, sir, approximately six o'clock.

Q. 3 Approximately six o'clock?

A. I did not make a case report or did not take intricate notes at that time. Detective Owen has on his case report approximately six o'clock he was notified; so I would say within a time frame of ten to fifteen minutes, before or after, that I [Vol. III, p. 22] was notified.

Q. 4 When did you—You said you then interviewed the victim?

A. Yes, sir.

Q. 5 Where did you interview her?

A. At her friend's house on Crosshill Drive. It was not at her residence. The exact apartment, it was an apartment on Crosshill Drive; but the exact apartment I don't know.

Q. 6 How long did it take you to go from—Were you at headquarters at the time you received this call?

A. I believe I was. I think on that particular day in question I came to work at around four o'clock that day. I could have been on post. I may have been on patrol when I received the call. I cannot state for sure.

Q. 7 You would not be able to say how long it took you to respond to the call?

A. No, sir.

Q. 8 Do you have any notes when you did arrive at the address to interview the victim?

A. No, sir; but I would say it would be around six o'clock. It would not have taken more than ten or fifteen minutes for me to arrive at the scene whether I had been on post or on patrol.

[Vol. III, p. 23] Q. 9 And you interviewed the victim and that took about how long?

A. I was there at the apartment approximately thirty to thirty-five minutes. She basically went over the same testimony that she's given here earlier.

Q. 10 Okay. And then what occurred after the interview?

A. After the interview I advised her that it was of her interest to go to King's Daughters Hospital to have a PERK test done and for any type of injury she might have sustained and for our investigation to have all the information included in the PERK test performed. She agreed to that. She, accompanied by a friend, drove to King's Daugh-

ters Hospital and I either followed them or they followed me, and we met again at the emergency room.

Q. 11 And were you treated at King's Daughters Hospital soon after arrival?

A. I would suspect so, within a time frame compatible to that type, yes. In other words, she did not have an hour or two wait.

Q. 12 Huh?

A. She did not have an hour or two waiting. It was probably soon after we arrived.

Q. 13 Could you explain why the examination performed on Ms. Richardson was conducted at nine p.m. in the [Vol. III, p. 24] evening?

A. No, sir, I cannot.

Q. 14 Now, in regards to this duffle bag, you testified on direct that the bag was seized at the time of the initial contact with Mr. James upon his attempting to leave from the gym?

A. He was refereeing the ball game. As soon as the ball game was over, he reached over and picked the bag up, started exiting the building, we confronted him. It was probably a time frame of forty seconds to a minute, roughly, between the time he picked the bag up and he walked out and we reached the suspect, and I immediately took the bag from his presence.

Q. 15 Who took the bag?

A. I took the bag.

Q. 16 Who, how long had you been there observing Mr. James?

A. We're been there approximately five minutes. We walked in. There was a ball game going on. We didn't want to walk out on the floor of the basketball game. We waited for the game to be over.

Q. 17 So there were a crowd of people in the gym?

A. Yes, sir, there was.

Q. 18 And this crowd exited upon completion of the game?

[Vol. III, p. 25] No. It wasn't the type of crowd that was there watching the game. It was more people milling around, people waiting to get in and out of the game. It

looked to be an intramural game or pick-up game. It was that type of game.

Q. 19 Just general traffic?

A. Right, just general traffic.

Q. 20 Did you have the occasion to—I presume then that you did not know about this duffle bag, so you possibly did not observe it during this period of time or anyone being around it?

A. No, sir. I did not observe the bag until Mr. James picked it up.

Q. 21 Now, upon his attempted leave, your stopping him, your taking control of the bag, where was the bag then placed?

A. In the front seat of my cruiser.

Q. 22 In the front seat of your cruiser?

A. Right.

Q. 23 Now, you stated then you proceeded to make a stop in the parking lot and for a short period of time—

A. No, sir.

Q. 24 Okay. What did you—You talked with Mr. James in the parking lot at Kentucky State?

A. As we went out. We asked him to step outside. We [Vol. III, p. 26] identified ourselves, I took the bag, we stepped outside, told him we had a warrant for his arrest, and to step down to the parking lot to the cruiser.

Q. 25 You were parked in front of the gym is what you're saying?

A. Yes, sir. I'm not that familiar with Kentucky State campus; even though I've been around there, I'm not familiar with it at all. We parked beside the gym, in front of the gym parking lot beside it, parked in the immediate area. And we walked to the car. I had the bag, set the bag in the front seat, and placed Mr. James in the back seat.

Q. 26 So this bag was in your cruiser from the time you left campus, proceeded downtown, and then came back up to Mr. James' residence?

A. Correct.

Q. 27 How long would you estimate that took?

A. From the time of the arrest till the time we went back and executed the search warrant?

Q. 28 Yes.

A. I couldn't honestly say. It was a significant amount of time, probably an hour to an hour and a half, maybe longer. I cannot exactly say.

Q. 29 Is it not customary that items of evidence or possessions of arrestees is processed at the time [Vol. III, p. 27] the person is processed through the police department?

A. That type of evidence, a gym bag, would not at the time summarily be an important part. In other words, at the time we assumed it was a gym bag which might have had some sneakers in it, some sweat clothes, that type of paraphernalia. We did not at the time suspect it being anything other that what it was. That's why it was treated in the manner it was and it wasn't searched immediately.

Q. 30 But it's customary that most items that are in the control of the person as far as their need to you, you immediately search that?

A. If the circumstances dictate that, yes.

Q. 31 You had investigated this rape and you did know that a weapon was used in it, did you not?

A. Yes, sir, we did.

Q. 32 Now, upon going to the James residence—

THE COURT: Let's move along, Mr. Peale.

MR. PEALE: Please?

THE COURT: Let's move along.

Q. 33 Do you have a copy of the search warrant?

MR. CORNS: Not with me, no, sir.

Q. 34 Okay. Officer Sparks, do you recall what items were listed in the search warrant to be seized or [Vol. III, p. 28] search for?

A. Do I recall a list?

Q. 35 Yes.

A. Specific items, no. I do remember in the search warrant it did list any evidence that might have been used. We knew we were looking for a gun. We knew that we were looking for strips of cloth, any type of linen apparent on the bed that would have been used. As far as specific items that were listed, no, I cannot say. I can only state as to what we were looking for.

Q. 36 Okay. I see on here you did not make the affidavit for the search warrant. I guess that explains why. Did you logn in the items that were recovered from the house?

A. Yes, sir, we did.

Q. 37 Did you particularly, specifically?

A. Yes, sir.

Q. 38 You did? Could you explain how the fact that the pistol was listed among items found in the residence?

A. I don't know that it was. It possibly could have been. I would have to see a copy of the search warrant.

Q. 39 Here's the copy of the search warrant with Judge [Vol. III, p. 29] Crittenden's signature and so forth, and on the back side—

A. That is my writing right here.

Q. 40 This is your writing?

A. This is my writing right here.

Q. 41 Is this also your writing?

A. Yes, sir.

Q. 42 The ones listed right there, a pistol—

A. Right.

Q. 43 Is that not the pistol that was introduced into evidence earlier?

A. Yes, sir.

Q. 44 And it is listed as being found in the residence?

A. We took the bag from the cruiser and opened it in the residence. We did not open the bag out in the car out on the street. We opened it in the residence. That's why it's listed on there as evidence.

Q. 45 How did you know upon your lifting this bag that there was something that felt like a gun?

A. You can feel a hard object through that canvas.

Q. 46 What all was in this bag?

A. The gun was in there and the strips were in there, the strips of cloth. Those was the only items that were of value that we seized at the time.

[Vol. III, p. 30] Q. 47 So you're saying that upon putting your hand under this—How did you lift this bag, may I ask?

A. Grabbed it under the side probably.

Q. 48 With both hands?

A. Right. You wouldn't have picked it up with the straps in the car. You would have had to move it with one hand or the other. The bag was full at that time. It was not collapsed. With the bag full, any item that would have been on the interior would have been reasonably felt.

Q. 49 You're saying that you did, as a result of that, felt the gun?

A. I felt an object that appeared to be a gun. I did not know it was a gun. We took the bag in the house and opened it.

Q. 50 And it was you that did this rather than some other police officer?

A. I felt what appeared to be a gun in the bag. We took the bag in the house. Whether I unzipped it or we, I unzipped it and we all looked in the bag together; but we were standing around when I brought the bag in. Whether I reached in and personally picked the gun out I cannot state.

Q. 51 Could you state whether the bag had been opened in this hour and a half period between leaving the [Vol. III, p. 31] gym and going back to the residence?

A. To my knowledge it had not left the cruiser, no, sir.

Q. 52 Had not left the cruiser?

A. Had not, no, sir.

Q. 53 Had it been opened any time in the cruiser?

A. I hadn't opened it, no, sir.

Q. 54 You did not think about that bag as being Mr. James' upon returning to the cruiser at the police department, going up to the house?

A. Please?

Q. 55 You did not remember that this was Mr. James' upon leaving the police station with the search warrant, going up to Mr. James' house to search the house?

A. The bag stayed in the cruiser wherever we went at the time.

Q. 56 I'm saying you did not see the bag and recall that it was Mr. James' bag at that time?

A. I'm sorry. I don't follow your line.

Q. 57 The bag was in your cruiser; right?

A. Right.

Q. 58 On your front seat; right?

A. Right.

Q. 59 You got back in your car?

A. Correct.

[Vol. III, p. 32] Q.60 In front of the police station?

A. Correct.

Q. 61 And drove from the police station back up to Mr. James' home with the search warrant, and you consciously did not see this bag. Is that your testimony?

A. NO. The bag was right where I was driving. It was in the car.

Q. 62 Were you in the car by yourself?

A. No, sir. Detective Owen was in the front seat with me.

Q. 63 You're saying that neither of you saw the bag and recalled that it was Mr. James' bag?

A. The bag was in the front seat of the car. We took it from Mr. James; so theoretically, we knew it was Mr. James' bag.

Q. 64 And theoretically, you drove all the way from Frankfort Police Department with this bag in the front seat between the two of you, didn't touch it or look in it?

A. No, sir, we didn't.

Q. 65 Now, other items that were retrieved from the home are listed here on the indictment and they are; so which of those items were in the home and which of those items were in the bag? Could you tell us?

[Vol. III, p. 33] A. You want me to read off all the items?

Q. 66 Please.

MR. CORNS: He's reading from the search warrant, not the indictment.

A. First item is towel found on bathroom floor that was found in the bathroom on the floor. Item Number 2 is a H & R .22 pistol, Model 929, Serial Number A2079134. That was found in the bag. Two towels, white and blue, found in the bathroom closet of the defendant's home. Item Number 3, one Converse gym bag, blue in color. It was found on the

defendant. Also, I've written under that, contained Item B, which Item B is the pistol. Item Number E, white cloth with possible blood stain found in Item D, found on person, which was in the gym bag, the white strip there, Bed linen consisting of one electric blanket, spread, sheets, and pillowcases that was taken from the defendant's bed in his bedroom. One white towel taken from the bathroom floor that was taken off the floor in the bathroom of the defendant. The only items taken from the bag were the pistol and the strips of cloth.

Q. 67 Strips of cloth?

A. Yes, sir.

Q. 68 So the bag was not that full according to the list [Vol. III, p. 34] of evidence recovered in the search warrant?

A. No, sir. There could have been other items in the bag that we didn't take. There might have been sweat pants. There might have been any number of items that were in there that we didn't take. The only items we took is what's listed on there.

Q. 69 And what was believed to be connected with the alleged crime?

A. Yes, sir. There could have been gym shoes, anything in there. I don't remember.

Q. 70 Now, do you have this alleged bullet that you found?

A. Yes, sir, we do.

Q. 71 Did you perform any test or have any tests been performed on this to determine if it was a bullet?

A. Yes, we did.

Q. 72 Do you have the result?

A. Yes, sir, we do.

Q. 73 Where is it?

A. Mr. Corns has it.

MR. CORNS: I don't have a copy with me.

Detective Owen or Detective Courtney. That piece of evidence was turned over to Detective Owen because he handled the case. So, therefore, he had all the analyses on all pieces of evidence done.

Q. 74 It's fairly well mashed up, isn't it?

A. Yes, sir, it is.

Q. 75 And you testified to the fact that this was a bullet; but you don't have any express knowledge that it is a bullet or not, do you?

A. Just from a copy of the lab report.

Q. 76 You didn't perform the lab report?

A. No, sir.

Q. 77 So you really don't have any knowledge other than what was in the lab report?

A. Not as a lay person, no.

MR. PEALE: I would like to have this marked for identification as Defendant's Exhibit 1.

Q. 78 Was there any test performed in the doorway to determine whether or not a shot was fired?

A. I don't know what type test that would be, but I didn't perform one.

Q. 79 So you don't have any knowledge that a test could be performed to determine whether a weapon had been fired in the doorway or not?

A. No, sir. There was a scratch on the wall; but we did not have a test performed to see if that, in fact, was a bullet mark or whatever, no.

[Vol. III, p. 36] Q. 80 So that scratch could have come from any source. Is that not correct?

A. That is correct.

Q. 81 So when you said that you believed that scratch was evidence of a ricochet from a bullet, you don't know whether it was or not?

A. Just from common knowledge, no.

Q. 82 What about expert knowledge?

A. From common knowledge I'd say it was. From expert knowledge, no.

MR. PEALE: No further questions.

RE-DIRECT EXAMINATION BY MR. CORNS:

Q. 1 Officer Sparks, you've testified about several items that you collected at the residence of the defendant. Is this customary procedure in cases like this?

A. In a case of this type we collect whatever evidence is relevant to that case; and those type of items listed, the bed linen, the towels, et cetera, would be the type of evidence that would be collected, yes.

Q. 2 And if any of those items have any evidentiary value or that's later determined—

[Vol. III, p. 37] A. We're just not going to pick up everything that's around.

MR. CORNS: No further questions.

Thank you.

RE-CROSS EXAMINATION BY MR. PEALE:

Q. 1 On re-direct, is it possible that someone could have access to this duffle bag while it was laying dormant, resting in your car, for that hour and a half?

A. No, sir, not unless they unlocked the doors and got into it and locked the doors back without our knowledge; and I don't think that would happen.

MR. PEALE: No further questions.

MR. CORNS: Thank you, Officer.

THE COURT: Call your witness.

* * * * *

WITNESS EXCUSED

* * * * *

[Vol. III, p. 38] The witness, MR. CLAUDE OWEN, having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CORNS:

Q. 1 State your name, please.

A. Claude Owen.

Q. 2 Where you are employed?

A. Kentucky State Police.

Q. 3 In what capacity are you employed with the Kentucky State Police?

A. Detective.

Q. 4 How long have you been a detective with them, Mr. Owen?

A. Approximately two years.

Q. 5 In your capacity as a detective assigned to Pose 12 here in Frankfort, did you have occasion to investigate a complaint of rape made by one Donna Richardson on May 6th, 1981?

A. Yes, sir, I did.

Q. 6 As best you can recall, approximately what time were you notified of this complaint and asked to investigate it?

A. About six p.m.

Q. 7 What did you then do, Detective Owen?

[Vol. III, p. 39] A. I proceeded to the hospital out here at Frankfort to contact Donna Richardson.

Q. 8 Who did you find when you arrived here at King's Daughters Memorial Hospital?

A. I contacted Trooper Sparks first, and then Donna Richardson.

Q. 9 Did you interview the victim at the hospital?

A. Yes, sir, I did.

Q. 10 What took place as far as the collection of samples from the victim was concerned while you were at the hospital?

A. There was, I took the hospital PERK kit test, one of the tests that the crime lab furnishes, and it was taken in to the nurse there at the hospital and she gave it to the doctor, and the test was given to Ms. Richardson.

Q. 11 Is this a customary procedure in this type case?

A. Yes, sir, it is.

Q. 12 After you interviewed her and they conducted the various tests on her, what did you then do?

A. We proceeded out to the Frankfort P.D., contacted Detective Courtney. He had heard about the alleged rape and he contacted us down there at the P.D. When we got there, he had checked, Donna Richardson said that the person that had assaulted her was [Vol. III, p. 40] named Mike and he lived next door to her, but she didn't know what his last name was. And I believe it was Officer Boetcher was there and he said that this Donna Richardson, I mean the neighbor next door at 268 East Main had had a fire previous, and they would know what the last name of the subject was that lived there. So we contacted Detective Courtney

and he'd found out from the fire department the last name was James. At this time Judge, I believe it was Judge Crittenden, was there and he issued a warrant for Michael James.

Q. 13 After you obtained a warrant for the defendant's arrest from Judge Crittenden, what did you and the other officers do?

A. We proceeded to 268 East Main here in Frankfort to arrest Michael James. When we got there, his wife advised us that he was not there, that he was at Kentucky State coaching a ball game. So we proceeded on over to the University. When we arrived at the university, we went in the gym and the, Mr. James was there coaching this ball game. The ball game was in session, and we stood by until it ended, which was just a matter of minutes. When it ended, why Mr. James walked across the gym to [Vol. III, p. 41] his left, picked up the gym bag, proceeded to come on out the front door. At this time we stopped him, told him who we were and what our nature of business was there, and asked him to accompany us outside, which he did. At this time, Mr. James was placed under arrest, placed in the rear of Trooper Sparks' cruiser. We proceeded on out just a short distance from where we had picked him up, stopped the cruiser. At this time, the warrant was read to Mr. James and he was read his rights, and we proceeded to bring him on down to the P.D. here at Frankfort.

Q. 14 Where was this duffle bag about which you've testified located when you first saw it, Detective Owen?

A. It was sitting on the bleachers at Kentucky State.

Q. 15 Did you see the defendant pick it up as he started to exit the gym?

A. Yes, I did.

Q. 16 If you recall, who took it from him when the police officers met him?

A. I believe Trooper Sparks did, to the best of my knowledge.

Q. 17 Where was the duffle bag placed after it was taken from the defendant?

A. In the front seat of the cruiser.

[Vol. III, p. 42] Q.18 After he was read the warrant and given a statement of his rights, where was he then taken?

A. He was brought back down to the Frankfort P.D.

Q. 19 At any time in your presence did he make any statement concerning this bag?

A. No, sir, not to my knowledge.

Q. 20 After he was brought down to police headquarters and photographed and fingerprinted, what did you and the other officers do next?

A. We had, after we had, I had read Mr. James' rights, we asked Mr. James if he would submit to a voluntary search of his apartment for the evidence that we were looking for in this rape case. He said he would not, and that he wanted to contact his attorney. So at this time we had Judge Crittenden still standing by there and we contacted him at this time, and then he issued a search warrant for 268 East Main Street.

Q. 21 After the court had issued the search warrant, what did you and the officers do with it?

A. We proceeded back out to 268 East Main Street, contacted Mrs. James, and told me what your nature of business was and the reason we were there, and told her we were going to search the house, and she agreed to voluntarily.

[Vol. III, p. 43] Q. 22 What did you find, Detective Owen, when you searched the house?

A. Well, the, if I may back up just a minute. We had went to 270 East Main prior to this. At this location we attempted to take fingerprints off the phone, off of some door facings, which we were, we didn't obtain any; but we did find a piece of lead laying on the living room floor as you come through the front door. And also, it appeared that the bullet had struck in the dry[illegible] there in the house and had lodged there on the floor, and it was just laying there loose. But it was pretty distorted.

Q. 23 After that, you then went over to the defendant's house at 268 East Main?

A. Yes. When we got there we took all the bed linen off the bed. We took a white towel from the bathroom, which

we dusted the bathroom also for latent prints, and the ones that we, we didn't find any prints of any value. While we were there, Trooper Sparks proceeded back out to his cruiser to gather up something; and anyway, while he was out there, he brought the gym bag back in that we had taken off Mr. James. And at this time he told me that there was something in the bag, and the [Vol. III, p. 44] bag was opened, and the gun and the white material that appeared to be the gag that Ms. Richardson had described was in this blue gym bag.

Q. 24 Detective Owen, I'd like you to look at what has been marked for identification as Commonwealth Exhibit #2 and tell us whether or not that appears to be the gun about which you just testified?

A. Yes, sir, it is.

Q. 25 Would you also look at these strips of cloth and ascertain whether or not they appear to be the same strips of cloth that were taken out of this duffle bag?

A. Yes, sir, they do.

Q. 26 The duffle bag has been marked for identification as Commonwealth Exhibit #3. Would you examine that and tell us whether or not that appears to be the same duffle bag?

A. Yes, sir, it is.

Q. 27 After the duffle bag was opened and these items were found in it, what was done with the duffle bag?

A. It was listed on the search warrant and taken back out to the cruiser where it was held until the next morning. At this time it was taken with the rest of the evidence back over to the crime lab.

* * * * *

[Vol. III, p. 52]

(Testimony of Det. Sgt. Robert Courtney):

Q. 9 Tell us, as best you can recall, where you were when you got the call and what time it came in.

A. Yes, sir. I was at home when I received the call needing assistance, to help the State Police investigate a rape.

Q. 10 Is it customary if an incident's committed in the city of Frankfort the State Police are working on it, to ask the city police to help out?

A. Yes, sir.

Q. 11 Where did you go when you got the call for city police assistance?

A. This was approximately 8:15 P.M. in the evening. I immediately went to the city police department where I was met by Trooper Owens and Trooper Sparks of the State Police.

Q. 12 Then what did you do?

A. The incident in question was discussed. The judge was called, the district judge, Judge Crittenden, was called, and the arrest warrant was obtained for the defendant, one Michael P. James. Detective Boetcher and myself, Trooper Sparks, Detective Owens then went to the defendant's house....

* * * * *

[Vol. III, p. 58] Q. 34 We've had marked previously for identification a lead object. Tell us whether or not that was the object that was found in your presence on the floor of Donna Richardson's apartment that evening?

A. Yes, sir. This is the object which appears to be a slug from a .22 caliber.

Q. 35 Did you perform any other investigation in this particular case, or is that in essence—

A. No, sir. That's in essence.

Q. 36. Did the defendant at any time explain to you how he happened to have in that duffle bag a gun which had been stolen from Donna Richardson on April 23rd?

MR. PEALE: Objection.

THE COURT: Overrule it. You may ask.

A. The only thing the defendant explained to me about the duffle bag was that he didn't know whose duffle bag it was.

MR. CORNS: Thank you. That's all. No further questions.

* * * * *

[Vol. III, p. 67]

RE-DIRECT EXAMINATION BY MR. CORNS:

Q. 1 Officer Courtney, when you examined this gun about which you've testified and identified, tell us whether or not it was loaded?

A. Yes, sir. This was a .22 revolver which had a chamber for nine cartridges. When it was examined, it had eight cartridges in it.

* * * * *

[Vol. III, p. 73] (Testimony of James E. Evans):

Q. 8 In the capacity about which you have just testified, have you received a copy of the latent print taken from the storm door of the residence of Donna Richardson on May the 1st, 1981, and a copy of the inked fingerprints of the defendant, Michael James, taken on May the 6th, when he was arrested?

A. I received a latent lift and a set of inked fingerprint impressions on May the 7th, 1981, from Detective Owen and Trooper Sparks, in connection with a case involving a Mike James and a victim of Donna Richardson.

Q. 9 Would you tell the members of the jury panel what examinations you have conducted concerning the latent print and the fingerprints and what that examination or those examinations showed?

A. Yes. I examined the latent lift that was submitted to us, first of all, to see if it was of value for comparison purposes. After determining, in my opinion, that it was of value for comparison purposes, I compared it with the inked fingerprint impressions contained on the fingerprint card; and upon this examination, I determined that the fingerprint on the lift was the same as or left by the same finger as the fingerprint impression listed [Vol. III, p. 74] as the left ring finger on the fingerprint card.

* * * * *

[Vol. III, p. 76] Q. 13 Are they similar or identical points of identification?

A. They are identical points of identification.

Q. 14 How many points are necessary before a positive identification can be made?

A. A sufficient number to be made to satisfy the examiner that the finger leaving the known impression is the same finger and could be no other finger that left the latent impression normally would run eight or nine points would be sufficient. From there on up would be a positive identification.

Q. 15 And you've identified twenty-six (26)?

A. Yes, sir.

Q. 16 In your opinion, how positive is this identification?

A. In my opinion, the finger that left this impression also left this impression. No other finger could have left it.

* * * * *

[Vol. IV, p. 8] (Testimony of Edward Taylor, Jr.):

A. I determined the blood type of the blood sample and also determined the secreter status. And I found that the victim had Group A blood and was a Group A secreter.

Q. 14 What do you mean by the term 'secreter'?

A. A secreter means that one is able to detect an individual's blood type in other body fluids other than blood, such as saliva and seminal fluid and also vaginal fluid. There are approximately eighty (80) percent of the population that are secreters.

Q. 15 Will you also refer to your report and ascertain if you received two pieces of white strip cloth from Detective Owen at the same time on the same date?

A. Yes, sir, I did.

Q. 16 What examination did you make of those two strips of white cloth?

A. I examined the pieces of cloth for the presence of saliva; and I found saliva and also Group A factors on that particular cloth.

Q. 17 So would or would not that indicate that the person who left that saliva on that piece of cloth was a secreter?

A. Yes, sir, it would.

Q. 18 We've had introduced previously in evidence, Mr. [Vol. IV, p. 9] Taylor, as Commonwealth's Exhibit 2, two pieces of white cloth. I would like for you to examine those and ascertain whether or not those are the pieces of cloth

you received from Detective Owen and the ones of which you conducted the examination about which you've just testified?

A. Yes, sir. These are the cloths. They have my mark.

Q. 19 I notice that there are some holes cut in the cloth. Would you explain who cut those holes and the purpose for cutting them?

A. Yes, sir. I made these holes during my examination, had to extract the material or the substance from the material; and in order to do this, we have to cut a small portion of the material itself. And also, the other hole was a control that we have to run. So these holes were made by myself during my examination.

Q. 20 Can you tell us whether or not you found in that particular strip of cloth where you found the saliva constituent, whether or not it contained a knot in the cloth?

A. Yes, it did.

Q. 21 Were the tests that you conducted in this analysis of the blood and also the strips of cloth, were they regularly recognized, standard tests?

A. Yes, they were.

[Vol. IV, p. 14] * * * * *

RE-DIRECT EXAMINATION BY MR. CORNS:

Q. 1 Mr. Taylor, one question on re-direct. With respect to the white towel about which you have just testified, you stated you found the semen constituent acid phosphatase. I assume from your report that was too limited in quantity to make a determination of blood group factors or whether or not they were a secreter?

A. Yes, sir. That's true.

MR. CORNS: Thank you very much. No further questions.

RE-CROSS EXAMINATION BY MR. PEALE:

Q. 1 One thing on re-direct. Did you receive—Well, I should state this more directly. You did receive vaginal smears, vaginal swabs, smears, from Donna Richardson;

also a tampon from Ms. Donna Richardson. Now, did you also receive—Did you test that?

A. Yes, sir I did.

[Vol. IV, p. 15] Q.2 What was the result of that?

A. I found that there was semen present on the vaginal swabs and vaginal smear and tampon, and also her panties. However, the semen was all too limited in quantity to determine the blood type.

Q. 3 To determine the blood type. Are you familiar that if there is a recent ejaculation, the amount of semen that would be present in the vaginal organ?

A. I don't understand what you're asking.

Q. 4 Well, I guess my question is the, was the sample that you received and the result that you received from testing that sample, would that be consistent with the occurrence of sex act, the recent occurrence of a sex act?

A. I would have no way of answering that, because of the other factors that may be involved.

Q. 5 Which would be such things as washing off and things of that nature?

A. Cleaning and also, you cannot determine specifically how much of an ejaculate was present, or if there was, in fact, an ejaculate.

Q. 6 However, under normal conditions would there be enough ejaculate present to determine the blood type or the blood grouping, under normal conditions?

A. Usually there is enough.

* * * * *

[Vol. IV, p. 16] The witness, MR. DAVID ADAMS, Having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CORNS:

Q. 1 State your name, please.

A. David Adams.

Q. 2 Where are you employed?

A. Office of Public Advocacy.

Q. 3 That's what we commonly call the State Public Defender's Office?

A. Yes, sir. That's right.

Q. 4 How long have you been so employed?

A. Since October of 1980.

Q. 5 In that capacity did you have occasion to meet [Vol. IV, p. 17] Donna Richardson?

THE COURT: You haven't told us what his capacity was, just his employment.

Q. 6 What position do you hold?

A. Director of Administrative Services.

Q. 7 In that capacity did you have the occasion to meet Donna Richardson?

A. Yes, sir.

Q. 8 What is her working relationship with respect to your office?

A. She's classified as Senior Clerk Typist. We use her as a keypunch clerk.

Q. 9 Directing your attention to May 6th, 1981, do you recall that particular afternoon?

A. If that's the day she showed up late for work after lunch, yes, sir.

Q. 10 Tell us whether or not it was customary for her to go home for lunch?

A. Yes, sir, it was.

Q. 11 Directing your attention to that afternoon, what time, as best you can recall, did she return to the office?

A. Sometime between 4:30 and five.

Q. 12 It was on the 5:00 side of 4:30?

A. Because I was getting ready to leave when she came [Vol. IV, p. 18] back.

Q. 13 What did you observe when you saw Donna Richardson?

A. She, I was getting ready to leave and I looked out the window and saw her car coming in the parking lot so I waited, and she came into the office crying, rather nervous and upset. I thought initially it might be because of my over-authoritative situation sometimes. I'm usually authoritative when they miss work and not let me know. But she was, I asked her to sit down and I closed the door and she started, she was trying to talk to me; but she was a little inaudible and I couldn't make out too much of what she was saying. And I knew it couldn't have had that much to do with me as supervisor; but finally got her calmed down a

little bit to where I could pick up a few words of what she was saying. And she related that she had been raped that afternoon, that someone had held her all afternoon and that's why she couldn't get back. And I said, "Well, report it. Let's report it." And she was, well, she was crying and I was trying to get this in. She was crying and shaking rather quite a bit. And she said, "No. That's the only way I could get away, that he'd let me go if I didn't tell anyone. Otherwise, he'd kill me." I said, "Well, you still [Vol. IV, p. 19] need to report it." And she said, "Well, the city police wouldn't do any good anyway," because they didn't when she reported the robbery and she wasn't going to report it to them because it wouldn't do any good. I said, "Well, the State Police have jurisdiction in Frankfort in the city, so report it to them."And we conversed on and I tried to convince her to report it. I said, "I'll report it." She said no, she was afraid he'd kill her. And I said, "Well, I'll wait till in the morning and give you a chance to think about it." I said, "I advise you to go to the hospital and get a physical check and report it to the State Police. That's my advice." Shortly after that she left.

MR. CORNS: No further questions. You may ask.

CROSS EXAMINATION BY MR. PEALE:

Q. 1 Mr. Adams?

A. Yes.

Q. 2 Is Ms. Richardson currently employed with the Office for Public Advocacy?

A. No, sir.

Q. 3 You said it was about between 4:30 and five when she [Vol. IV, p. 20] did appear at the job site.

A. Yes, sir.

Q. 4 On the job site. Were you upset at the fact that she had not reported that afternoon?

A. Yes, sir. I'd tried to call her apartment a couple of times, yes.

Q. 5 What times did you try to make these calls?

A. Oh, I would say mid-afternoon.

Q. 6 Mid-afternoon?

A. Yes.

Q. 7 Had you tried after say, after 4:00, after 3:30, getting specific as to those times?

A. I tried twice and I cannot pinpoint the exact times, no.

Q. 8 So you say you were upset. Do you think that it was visual that you were upset?

A. I doubt it.

Q. 9 Well, you say that you are authoritative in your position. Is it common knowledge that when you say that you are authoritative, does that mean that you are a little stern as far as your expectations on the job?

A. Some people would look at it that way. I expect people to be there, and that's it.

Q. 10 You have the kind of attitude that would upset some [Vol. IV, p. 21] people?

A. I doubt that I would upset anybody, no. I do expect them to be at work. That's common for supervisors.

Q. 11 How had Ms. Richardson been performing on the job for the last month prior to this incident?

A. She was picking up speed on the keypunch, which I was—

Q. 12 Did she not have some problems on the job?

A. I don't know that she has problems. She did fluctuate from up and down as far as her keypunch time; but prior to this incident she had been studying programming at Kentucky State, and I saw a lot of potential in her.

Q. 13 Was it not true that her work performance had sort of diminished in the last two weeks prior to this May 6th incident? Could you tell that her emotional state was affecting her work?

A. I couldn't tell any difference from the time that she came to work.

Q. 14 Did you not state to me yesterday afternoon that she had been bothered in the last two weeks prior to the incident when the first burglary occurred?

A. She was somewhat upset.

Q. 15 That it did affect her job?

A. She was some upset over that.

[Vol. IV, p. 22] Q. 15 So in other words, you say you'd been understanding of that situation, had you not?

A. Yes.

Q. 17 In other words, you had allowed her a certain amount of leverage and latitude on the job as a result of the recent events. Is that not correct?

A. I don't know about leverage and latitude, but I was trying to be understanding of what had happened to her, yes.

Q. 18 And would you say that that was being a little lenient in dealing with her and her situation?

A. I was trying to be understanding, whatever that entails, yes.

Q. 19 Could that be termed also as being a little lenient; in other words, giving her a little more rope, a little more rope, and a little more rope, so to speak?

A. I don't deal out too much rope, no.

Q. 20 So what I'm saying, you're generally considered an authoritarian figure, very stern supervisor, so to speak?

A. Yes, sir.

Q. 21 So in light of the fact that there was a, this period that Ms. Richardson had been failing in her job performance, do you not think that she was some-[Vol. IV, p. 23] what intimidated by your reactions to her being late or not appearing at work at all that afternoon?

A. I didn't say she was failing in her work.

Q. 22 I said that her job performance had—

A. Fluctuated some, yes.

Q. 23 Fluctuated and diminished somewhat. I'm saying, do you not feel that she was concerned about your reaction and response to her not being at work that afternoon?

A. I would assume she probably would have been, yes.

Q. 24 Do you think this concern was to the effect that she might have been genuinely concerned about her job?

A. Given the circumstances, I really don't know.

Q. 25 She didn't, the circumstances, she didn't know what your reaction was going to be until after that, after she had related this to you. Is that not correct?

A. If I missed a half a day of work I'd be concerned what my boss would have to say, too.

Q. 26 Don't you think that you'd also be concerned about your job?

A. I probably would to some extent.

Q. 27 Do you think that concern would be enough or sufficient to make someone fabricate a story or an [Vol. IV, p. 24] alibi?

A. I wouldn't fabricate a story, no, sir.

Q. 28 You would not?

A. No.

Q. 29 But maybe someone else; right?

A. I can't answer for someone else.

Q. 30 But you would think that it's possible?

A. All things are possible.

Q. 31 Now, in regard to her not reporting to the city police, you said she came in between 4:30 and 5:00. Are you certain about that time?

A. Yes, sir.

Q. 32 Now, you said that she stated she didn't want to report this to the city police because she was dissatisfied with the way that they had what, investigated the robbery, the burglary?

A. Yes, sir.

Q. 33 And you advised that she could call the State Police?

A. Yes, sir.

Q. 34 And that what, the State Police had jurisdiction in the city, also?

A. Yes, sir.

Q. 35 Did you not offer to call for her?

A. Yes, sir.

Q. 36 And she refused, did she not?

[Vol. IV, p. 25] A. Yes, sir.

Q. 37 Did you not offer to call for her?

A. Yes, sir.

Q. 38 And she also refused?

A. Yes, sir.

Q. 39 Did you start to call yourself?

A. I never picked up the phone, no.

Q. 40 After talking with Ms. Richardson, what did she do? After talking with you, what did Ms. Richardson do?

A. Left my office.

Q. 41 She casually left your office?

A. I didn't say casually, no, sir.

Q. 42 Did she say she was going to the State Police to report this incident?

A. She didn't tell me where she was going.

Q. 43 But she just left and said nothing. Did you then the next day report this to your supervisor as you had stated to her?

A. Yes, sir.

Q. 44 Was there any employment action taken against her?

A. No, sir.

MR. PEALE: No further questions.

MR. CORNS: That's all. Thank you, Mr. Adams.

* * * * *

[Vol. IV, p. 31] The witness, MR. MARION BATES, having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. PEALE:

Q. 1 Would you state your name for the record, please?

A. Marion Bates.

Q. 2 Do you have a nickname that you are also known by?

A. Yeah. Everybody calls me Popeye. My right name is Marion.

Q. 3 Yes, sir. Mr. Bates, where do you live?

A. 266 East Main.

Q. 4 266 East Main. How long have you lived there?

A. About twenty years.

Q. 5 What's your current status now? Are you employed? Employment status.

A. Beg your pardon?

Q. 6 Are you employed?

A. No. I'm retired.

Q. 7 Mr. Bates, I contacted you and asked you about events that, did you have any recollection as to events that occurred on May 6th of 1981. What was your response to that?

A. Well, I was out there working on my car.

Q. 8 When you say out there, where are you speaking of?

[Vol. IV, p. 32] A. Out there in the yard.

Q. 9 Now, I have here on this board—Could I get you to look this way? I have here on the board what is the situation close to where you live. There's 270, there's 268, and would your house be directly next door to 268?

A. Right.

Q. 10 Which side of this house do you live on?

A. We live on the right side.

Q. 11 This side right here?

A. Yes.

Q. 12 Now, as you're testifying, you say that you were out in the front yard. About where were you at?

A. Well, I'm—

Q. 13 This is a driveway in between your house and...

A. Right.

Q. 14 ...268?

A. Well, I'm right across the driveway.

Q. 15 Is that fairly close to where you say you were?

A. I was out there.

Q. 16 Okay. How long had you been out there?

A. Well, I actually don't know, but I was out there pretty early.

Q. 17 In the morning?

A. Well, it was around, about, like about seven of [Vol. IV, p. 33] twelve, or seven.

Q. 18 Little bit before twelve noon?

A. Yes.

Q. 19 Sort of go over what you did on the afternoon in question.

A. Well, I was out there and putting some putty on my car and it was drizzling rain; and I was out there looking to see while it was raining so I could put this on the car.

Q. 20 Okay. In other words, you were trying to plug a leak in your windshield?

A. Right. So, in the meantime, while I was doing it, Chuck Lambert come up.

Q. 21 Chuck Lambert?

A. Yeah. So he goes downstairs and he calls me, showing me how he had fixed the basement up in the house.

Q. 22 Okay. Now, when you're saying fixed the basement up in the house, what house are you talking about?

A. In the house where he lived in.

Q. 23 When you say he are you referring to Mike James?

A. Yes.

Q. 24 In other words, you were in the basement of this house here?

A. Right.

[Vol. IV, p. 34] Q. 25 Okay. And you say you were in the company of Chuck Lambert?

A. Yes.

Q. 26 Do you know what Mr. Lambert's relationship is with the house that Mr. James was living in?

A. Yes. He owns it.

Q. 27 Okay. Is it sort of an arrangement that he had you sort of looking out for his property and things of this nature?

A. No.

Q. 28 Well, at the time—Go ahead. You were saying he was showing you what he'd done to the house?

A. Right.

Q. 29 During this time what was he, renovating the house or something of that nature, fixing it up?

A. He was fixing it up.

Q. 30 Okay. Was it not, let's say, common for him to show you what work he was doing on the house? Had he shown you the work that he'd been doing as it progressed and things of this nature?

A. Yeah. He was showing me about what he had been doing to the house. Well, me and him was good friends, and he was just showing me how he had fixed the house up.

Q. 31 Okay. So on May, the time he showed you the house [Vol. IV, p. 35] on May 6th was not the first time that he had done it. That's more or less what my question is.

A. No.

Q. 32 Okay. You were being shown the basement by Chuck Lambert. Go on and tell us what happened.

A. And so he was showing me and he, Chuck, he said that he, I don't know, about twenty minues till one, he said he had to go back to work. He had to be back at work at 1:00. So I go, he locked the door and me and him come on out and I come on back up to the car in the driveway, and started working back on the car. And so, in the meantime, Mike, he came out, Mike came out and he locked the door, he hollered at me, and I hollered back at him. He locked the door and went on up the street. And so, that's all I seen. But in the meantime while I was in the house down in the basement, I didn't hear nothing upstairs but the record player. He had his record player going and I heard the record player. But me and Chuck went all over the basement and looking at it.

Q. 33 Does this basement cover the whole floor surface area of this apartment?

A. Uh-huh.

Q. 34 When you say Mike came out of the house, what Mike [Vol. IV, p. 36] are you referring to?

A. Huh?

Q. 35 Who was Mike?

A. The boy that lives there, him.

Q. 36 Is this gentleman seated here across the table from me the Mike that you're speaking of, Mike James? Is this the Mike that you were speaking of that came out of the house?

A. Yeah.

Q. 37 And left. Which direction did he go?

A. He went on up the street.

Q. 38 Is this toward Kentucky State University?

A. Yes.

Q. 39 About what time was this?

A. I would say he came out about 2:00, maybe a little bit before.

Q. 40 Did he speak to you or did you all have words?

A. Yeah. He hollered at me and locked the door and went on up the street.

Q. 41 Now, was it common practice that you all would speak or have a few words with each other?

A. No. We just spoke. I mean, we didn't—

Q. 42 But you all did speak to each other. When he saw you out on the street he would speak to you and you would speak to him?

[Vol. IV, p. 37] A. Yeah.

Q. 43 Now, did you see anyone go in or out of Mike James' apartment during this time?

A. No, I didn't.

Q. 44 Do you know Lisa James, Mike James' wife?

A. Yeah.

Q. 45 You would recognize her if you saw her?

A. Yeah.

Q. 46 Do you know a lady by the name of Donna Richardson?

A. No, I don't know her; but I seen her.

Q. 47 You've seen her?

A. Uh-huh.

Q. 48 Would you recognize her if you would have seen her?

A. Yeah. I would recognize her if I seen her.

Q. 49 How long after 2:00 did you stay out front of your house, out there working?

A. I don't know. I stayed out there really—I don't know the time, but I stayed out there for quite awhile, a lot of times till 4:00.

Q. 50 But you were working on this leak all this time or were you just doing other things?

A. I was doing other things, cleaning the car out and just doing little piddling like.

Q. 51 Mr. Bates, is it fairly common knowledge around that area in those houses that you sort of stay around [Vol. IV, p. 38] the front porch and around the front of your house most of the time?

A. Most of the time.

Q. 52 So most of your neighbors expect to see you out and around, don't they?

A. Right.

Q. 53 Do you recall what time Mrs. James came home that day?

A. Yeah, cause when she came home I was still out there in the car, working on the car, and she came on over to the house. And she was, she went on in there and used the telephone, I guess. I don't know.

Q. 54 So Mrs. James would use your telephone at various times?

A. Yeah. Most of the time she uses my telephone.

Q. 55 Was Mrs. James a friend of anyone in your home?

A. M-hmm.

Q. 56 Who in particular was she a friend of?

A. She was a friend to Ms. Alma, Dorothy.

Q. 57 What kinship is she to you?

A. Who, Mrs. James?

Q. 58 No. Ms. Alma?

A. Oh. She's my lady friend.

Q. 59 Okay. Is there anyone else? Did you say Dorothy?

[Vol. IV, p. 39] A. Yeah.

Q. 60 Is that the same person?

A. Same person.

Q. 61 She's your lady friend?

A. Yeah.

Q. 62 Is there anyone else in the house that she comes over to talk to various times?

A. Yeah.

Q. 63 Who would that be?

A. Girl named Annette, well, my grandson's girlfriend.

Q. 64 Your grandson's girlfriend?

A. Yeah.

Q. 65 Okay. Did you on this day in question hear any noise that might have sounded like a gunshot?

A. No.

Q. 66 Did you on this day in question hear any noise like a scream?

A. No.

Q. 67 Did you on this day in question see Mr. James leave the house and come back in?

A. No.

Q. 68 With another lady prior to his leaving, going towards Kentucky State University?

A. No. When he left he didn't come back.

Q. 69 And your testimony today is that you were out and [Vol. IV, p. 40] around this area from approximately the time of 12:30 to roughly sometime after 4:00?

A. Right.

Q. 70 And you did not see anyone other than Mr. James?

A. No, I didn't see a sole. Only person I saw was Chuck and Mike when he left.

MR. PEALE: Okay. No further questions.

CROSS EXAMINATION BY MR. CORNS:

Q. 1 Mr. Bates, I'm Ray Corns, Commonwealth Attorney, and I would like to ask you a few questions, please, sir.

A. Okay.

Q. 2 I believe when Mr. Peale was asking you questions a few minutes ago he said he contacted you about the case. Do you recall when it was?

A. No. I don't know exactly what day it was; but I know I was there.

Q. 3 But you don't recall what day Mr. Peale contacted you?

A. No.

Q. 4 You have any idea what month it was?

A. No, I don't.

[Vol. IV, p. 41] Q. 5 Do you have any idea how many months ago it's been, or weeks?

A. Well, I really don't know; but I mean, I really don't know how many months it's been. But in the meantime, I know I was working on my car that night.

Q. 6 But you don't know how long it's been since Mr. Peale contacted you?

A. I would say it was about four or five months, maybe longer.

Q. 7 I'd like to ask you a question about the location of the house, if I might, please, if you'd look over here at the board. This is where you live at 266 East Main?

A. Right.

Q. 8 And this is where Mr. James lives?

A. Right.

Q. 9 Then we have a house up here, 270?

A. Right.

Q. 10 Are you familiar with the location along here, how close they are to each other?

A. Yeah.

Q. 11 Tell the members of the jury panel whether it's a long distance from 270 to 268 or a short distance.

A. Be short.

Q. 12 How long would it take to walk from here to here?

[Vol. IV, p. 42] A. About a minute, I guess. I would say so.

Q. 13 Is it as far as from here to the back door of the courtroom, about that distance?

A. No, not from where Mr. James lives it's not; because I can stand on my porch on the banister, and I can just about jump over there.

Q. 14 That's the point I'm trying to ask you about. These houses are pretty close together, aren't they?

A. Yeah. All the houses is right there in a line; and I mean it's no long distance to walk nowhere.

Q. 15 So it would be closer from 270 to 268 than it would be from here to the back of the courtroom, wouldn't it?

A. That's right.

MR. CORNS: That's all. Thank you very much.

RE-DIRECT EXAMINATION BY MR. PEALE:

Q. 1 Let me elaborate more on that because I think Mr. Corns is not truly representing what the situation is. From the far side of the house at 270 East Main, which is where Ms. Richardson lived, to the side that Mr. James lived in the house next to you, [Vol. IV, p. 43] would you say that it, are you understanding what I'm saying, the house 270 is the house, one house up from where Mr. James lives?

A. Right.

Q. 2 Now, there's an apartment on the far side of that house?

A. Yeah. There's about three or four apartments, I think.

Q. 3 And it's the far apartment on the far side of the house. Would you say that the distance from that far side apartment to the apartment, Mr. James' apartment, is between from where you're at to the back of the courtroom?

A. Yeah. I would say so.

Q. 4 So it would take, as you say, what, a minute or so to walk there or around a minute?

A. Around a minute.

Q. 5 Do you think that on the date in question if there was Mr. James accompanied with, in the presence of a lady, that if he walked from his -ouse down to his apartment you would have seen him?

A. Sure.

MR. PEALE: No further questions.

MR. CORNS: Nothing further. Thank you, Mr. Bates.

[Vol. IV, P. 44] * * * * *

The witness, MR. CHARLES H. LAMBERT, having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. PEALE:

Q. 1 Would you state your name for the record, please?

A. Charles H. Lambert.

Q. 2 Mr. Lambert, do you have any relationship with the piece of property located at 268 East Main Street?

A. Yes. I own that property.

Q. 3 Do you make certain use of that property?

A. Yes. I use it for rental property, and I use the basement sometimes for storage and I've been slowly cleaning it up.

Q. 4 What had you been doing with the house? Had you been renovating it?

A. Yes. I've been taking some of the old paper off the walls, scraping it down, getting it ready for [Vol. IV, p. 45] painting.

Q. 5 Now, do you know a Mr. Marion "Popeye" Bates?

A. Yes.

Q. 6 How do you know Mr. Bates?

A. Mr. Bates is the neighbor to my property and since I bought that property he and I kind of had a daily relationship while I was doing the work on the property. Popeye comes over and talks to me, see what I'm doing, that kind of thing. And he's basically been kind of an unofficial security man for me.

Q. 7 Why do you say that?

A. Because he's always there and keeps an eye on the property for me.

Q. 8 Always there. You mean he's always in and around this area?

A. You can always find Popeye somewhere, either on his front porch or in his back yard if the weather's nice.

Q. 9 But you're saying, let's say it's sort of common knowledge that Popeye's generally around his porch and out around his house?

A. Yes. In the summer sometimes he sleeps on the porch.

Q. 10 Sometimes sleeps on the porch in good weather?

[Vol. IV, p. 46] A. Yes.

Q. 11 Let me ask you, was one of your renters in the apartment Mr. Michael James?

A. Yes.

Q. 12 How long had Mr. James rented your apartment?

A. I can't give you an exact time. I think maybe about four to six months or something, something like that. I'm not exactly sure.

Q. 13 Do you know Mr. James?

A. Only as one of my tenants.

Q. 14 Would you recognize Mr. James if you saw him?

A. Yes.

Q. 15 Is he here in the courtroom?

A. Yes. That's Mr. James sitting there with the purple-looking sweater on.

Q. 16 He's sitting across the table from me?

A. Yes.

Q. 17 Do you recall having the occasion to show your property, your basement to Mr. Bates on or around May the 6th?

A. I don't recall showing the property to Mr. Bates on that particular date; but I've shown the property to Mr. Bates on many occasions.

Q. 18 So it's not unusual that if he testified to the fact that you showed him the property on that date [Vol. IV, p. 47] in question, you'd say that that's something that could have occurred on that date in question?

A. I would say if Mr. Bates said I showed him the property on that date then he would be correct.

MR. PEALE: No further questions.

MR. CORNS: Nothing at all, Mr. Lambert? How are you today?

* * * * *

WITNESS EXCUSED

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THE COURT: Anything further, Mr. Peale?

MR. PEALE: That's the case for the defense, Your Honor.

* * * * *

*[3] MR. PEALE: Note that the defendant objects to several of the instructions being given to the jury.

JUDGE MEIGS: Overruled.

[4] MR. PEALE: The defendant requests that an admonition be given to the jury that no emphasis be given to the defendant's failure to testify which was overruled.

* * * * *

[8] foreman. Mr. Peale?

MR. PEALE: Judge Meigs, Mr. Corns, ladies and gentlemen, we are now entering what was considered next to the last phase of this proceeding in which you have been sitting here for a little bit over a day. This is a closing argument. It basically is an opportunity for both counsel to stand before you and restate the evidence in the case as it was presented from this witness stand, and basically how it

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(*The following pages of the Appendix, pp. 158-188, are from the Red Volume of Transcript which is without a "Volume" number.)

fits within the particular interest of each counsel. Myself being in defense of Mr. James, Mr. Corns in prosecution. I think that there are a couple of things that need to be initially addressed. One is in regard to presumption of innocence which you promised to render Michael James throughout this proceeding.

Two, the fact that if there is some question about the case, about the facts, about the proof that was presented, if you have that reasonable doubt, you will again find him not guilty. We feel that as this case has progressed, there should be more than an adequate amount of reasonable doubt in this case. We feel that we have shown through the evidence as it was presented by the Commonwealth, that there is reason to have serious question and also we feel [9] that as we presented the evidence in defense of Mr. James, there is no doubt that there is some very serious questions of what did happen on this date. Our position is that it could not have happened as portrayed by the prosecution, and then I guess the best thing for me to do is begin by the instructions. You will be taking these with you in the courtroom, in the jury room, excuse me, and you will then have the responsibility of doing what—fitting the evidence and the facts of this case as they were presented from this witness stand into these instructions. Now, I think it is best to sort of address them one by one because I think it is very important that we look at the quantum of evidence to see exactly where this evidence lie, exactly where is it. I know you have heard it as jurors in this matter, and I wish to ask your indulgence at this point, but I think it is necessary for me to more or less stress a few points as I think they are very important to our case, and also establish our innocence. First, there is a second degree burglary. It says that he entered unlawfully the dwelling of Donna Richardson. There is no evidence that Mr. James entered that house. There is no evidence that Mr. James entered that house. They presented evidence of a finger-[10]print which was found on the inside surface of the door which according to the experts could have been there for any period of time. No one knows. The officer testified that there was a forced entry from the outside, forced entry from the outside, and

then the gentleman said that this was discarded somewhere. Presumably there are some question as to whether there was a forced entry. If there are fingerprints on the inside, why were there no fingerprints on the outside surface, and that is still on the outside part of the residence. There is nothing that said or indicated that Mr. James, even if you take this fingerprint, went any further than that. We think that the fingerprint establishes nothing. It established the fact that he was there at some time. When—who knows. Who knows. Further, it says that committing a crime of theft. They never established that there was anything taken in this entry if it was, in fact, committed by Mr. James. Nothing. They did allude to the fact that there was some gun that had been taken at an earlier period, but that was not connected to this incident or the forced entry on May 1. Nothing factual in any evidentiary way establishes any guilt according to these instructions, this instruction in particular. Moving further and I [11] must remind you that Mr. James is not here for a burglary of the home for, in which a gun was taken. I think that is important too. He is not being tried for that today, and in light of this instruction, he should not be found guilty on that basis. The second instruction is in regard to rape, and it says that he engaged in sexual intercourse with Donna Richardson, and that he did so by forceful compulsion. I think this is very important because we need to look at what the evidence was in regards to this rape. Ms. Richardson came in and she was here to state what happened, and she did state that this was done with a weapon; this was done with a threat of bodily injury, serious bodily injury. Several times she was threatened; several times she was threatened. Then, she did state that a sexual act did occur. Now, what other evidence was there of a rape? I think we need to begin with how this actually occurred. Mr. James comes to the door on the pretense of a medical emergency and I need to use the phone. He then moves from this residence with the victim across, down this yard, across the driveway into this yard, far side of this house. No one saw this. He was supposedly doing this at gun point, during the lunch hour in Frankfort on a business

day. We know what kind of [12] town Frankfort is. We know what kind of town Frankfort is. Frankfort is a town that there are a lot of state workers. There is a lot of commotion especially up and down East Main Street. No one saw this. Then it just so happens that as Mr. Marion Bates says, I was out and around during all this time. I did see Michael James. He admitted he saw Michael James on the day in question but I only saw him exit from his apartment alone and go up toward the Kentucky State University Campus. I saw no one else exit from this apartment anytime during this period. Mr. Bates' testimony is also pretty interesting in that he said Mr. James came over to his home to use the phone quite often. She was friends with the ladies in this house which is closer to their house. Did—why did he go up here to use the phone in the first place to someone you don't know. Why carry on a very personal relationship that I have woman problems, someone that you don't know. This lady said from her own words, I do not know these people. I am not familiar with them. We don't have much—I think there is a question that is presented because of the fact that Mr. James appeared at the door and he was—and his presence was not questioned. He [13] was allowed to enter as stated by Ms. Richardson. Moving further along the lines and details as stated by Ms. Richardson, that this happened between 12:40 and 12:45. So if Mr. Bates was incidentally in the basement and he missed her going in, how did he miss her coming out. He said, I was out here until well after four o'clock. I saw Mr. James leave at two o'clock. Ms. Richardson in her testimony stated she left Mr. James in the house. Mr. Bates said I saw Mr. James leave at sometime after two o'clock in the afternoon. Ms. Richardson said, I reported back to work fairly directly after I left Mr. James' home, and she stated it was around four o'clock, a little bit after four, 4:05. Her boss came in and said she reported at work sometime between 4:30 and 5:00 o'clock, gross inconsistencies, gross inconsistencies that raised a question as what I think constitutes a reasonable doubt. Has the Commonwealth erased that reasonable doubt? No! N-O. No. Through nothing. There is no evidence to say that that reasonable doubt has

been erased by the Commonwealth. Mr. Lambert said it was fairly common knowledge that Mr. Bates was out and around this street. Ms. Richardson said, no, there was nobody [14] out there. I don't usually see anybody out there. I mean, and it is common knowledge that Mr. Bates even sleeps on the porch when it is warm weather. This gentleman, Mr. Bates, said I was in the basement, didn't hear anything, no screams, no tussles, nothing. I know Mr. Corns is going to say the trick of attacking the victim. Well, let me tell you, who can we attack here by the mere fact that we are here today, Mr. James is being attacked and is it right and has the case been proved satisfactorily to send him to this state's penitentiary for a certain period of time as the law prescribes. No, it is not, no, it has not, and it is your duty as promised not to do that. The state hasn't proven its case. Moving further, the contact of Ms. Richardson—she goes to work after 4:30 which is time that she would normally be off anyway, speaks with Mr. Adams, and is visibly upset. Mr. Adams stated that her work performance had diminished, and he had been tolerant of that for a certain period of time. I beg you, would you not be visibly upset upon returning to work after not being there this afternoon, and you had a situation where you knew you had a very stern boss that was going to expect a very good explanation of what went on [15] —of course. Of course. He expected that and it was common knowledge that he was a stern authoritarian boss. He said that. He said that. And so there is this story that is told to him in order to what—I don't know. I hate to say it, but I don't know—I will leave that up to your good common sense. Mr. Adams said, I advised her to call the police. She said, no. She was threatened by it. Where is the threat when she is away from the gentleman that allegedly did this to her, that held her for three to four hours according to her, that had a gun that supposedly according to her went off, that she could have been shot at any time, killed. She is threatened several times with her life, several times with her life. Is that threat still around? No. Here is a man that she has known as her boss for a certain period of time. Who advises her to do what would be considered the safest thing to do? Call

the police—no. Call the state police—no. I will call them for you. No. Don't do that. She leaves that place, goes to another friend's home—where in Frankfort we don't know. Then there is another friend's home that she went to. Where in Frankfort, we don't know, at which time she did report this [16] incident—quite a few hours after this. Quite a few hours after you had been physically violated, quite a few hours after you had been physically threatened, quite a few hours after you had been told that, hey, I will kill you, allegedly told that. Is that reasonable? All these people were people that she was friends with and knew. The alleged perpetrator of this act was not there. I asked her categorically, do you now look at the police as protectors; yes is her answer, yes is her answer. Why not get protection is the question. Moving on we have a situation that there were certain items that were introduced which was supposedly connected to the rape. The lab technician testified that there were hairs found on supposedly the white towel that was laid across the bed in which the sexual act occurred. He stated that the hair fiber was on the towel, was the same as Ms. Lisa James' hair fibers. Nothing to Ms. Donna Richardson's, nothing similar to Ms. Donna Richardson's. This was allegedly hair fibers from the hair and pubic region. Why were not Ms. Richardson's hairs on there also in the question, a reasonable doubt. Moving further, there was testimony to the fact that these rags were found in [17] Mr. James' home and they had saliva samples which were similar to a blood type secreter, a secreter is the classification as Ms. Richardson is. So also that technician's testimony that I believe 80% of the population are secreters, 80%. It is a large part of the population. He also stated that 41% of the population is of the A series or A type. So it means that it is just as likely that that saliva sample could be Ms. Lisa James' of whom no blood sample was taken. They took hair samples, why not blood. The frequency of the fact that it was established that she was also an A type. This towel—people spoke about the knots but where are the knots today. Who took them out. If one person's saliva can be on there, why not another's. A reasonable doubt. There are so many things that I know that we

can dwell on and I will continue on with a few more if you will forgive me. In regards to the piece of lead what was found here, though officers were willing to testify that it was a bullet, none of them could say that it exact was in reality a bullet. It was inconclusive. None of them tested it. It could have been any piece of metal, any piece of metal that was matched up. There was no test to see that there was a gun fired there. Nothing. Nothing. Absolutely nothing to [18] corroborate the events as related by Donna Richardson. Now, in regards to the jacket, I asked the officer, did you have items that were taken from Ms. Richardson's samples to test for semen and he said, yes. Too small an amount to test and to determine the type of blood, the type of blood, type as a secreter or A type or whatever type could have been determined to see if there was an adequate amount present. Now, there was pubic hair, panties and a tampon taken. None of these items had enough semen which is the fluid ejaculated by the male during sex present in Ms. Donna Richardson. Was there sex? The gentlemen said normally when there is an ejaculation, there is more than enough to test. He is a specialist. Ladies and gentlemen of the jury, recall the evidence, please. Recall the evidence, please. Further, there was testimony that Ms. Donna Richardson washed off in the sink at the James' home. There was no towel introduced to show again pubic hairs, semen, nothing, nothing. They took all the things that remotely were connected to this robbery, excuse me, rape, from the home. Why was there not this towel that she supposedly washed up that would have possibly had hair traces or semen there [19] produced. There was none. The officer told that he even went out in the car and got this bag with this gun in it as they said, brought it back in the house and we listed that. So they gathered everything that was in sight so to speak. I will get to that gun later, please. Basically, that is the nature of the case as far as the rape. Again, Mr. Bates said if there was anyone that came in and out of that house, I would have seen them. I recognized Ms. Lisa James, and I also, I know Ms. Lisa James, I am acquainted with her. I have recognized Ms. Donna Richardson. I was there all this time. The only per-

son I saw come and go out of that house was whom—the defendant, Michael James, the defendant, Michael James, only, only, the only person. Now, who has received this stolen property? The primary issue here is one of identification and the fact that this gun was owned by Ms. Richardson. What document was produced to show that she did in fact own this gun. She herself testified that she had another gun but she said I got that gun after this one was taken. What was shown to produce or produced by the prosecution to establish the fact that these were different guns. That in fact this other gun was the one that was in fact taken at an earlier date—nothing, no proof, no evidence other than the [20] fact that there was an—a report made with the serial number and again, who is to say that those are the same guns since there is more than two. No one tested the second gun so to speak but it was mentioned from the lips of Ms. Donna Richardson. Why was this gun not tested, checked into, and the serial number produced and also receipts or some proof to show that these are guns that were purchased by her and by her father, by somebody at a certain time. There was nothing. Nothing. Nothing. How can there be proof beyond a reasonable doubt if there is nothing. That in possession said pistol was not defendant's intention to return it to its rightful owner again. Who is the rightful owner. We don't know. I have only tried to highlight a few things. I could spend quite a bit more time here but I do not want to test your patience nor the court's. I feel that I have more than adequately presented in a manner that we couched the evidence as you have heard it here from this witness stand, what has been produced in this trial, and also shown you that there has not been proof beyond a reasonable doubt on any of these offenses, none of them. You promised myself and Mr. James in the voir dire that you would [21] consider that proof as it came from this witness stand and in considering that proof you will presume him innocent until the case by the Commonwealth, the prosecution, has been proved by what—beyond a reasonable doubt and a reasonable doubt is what I consider a question about the case, question about these elements, question about the evidence, question

about what could have happened, question about who to believe and who not to believe, a question that only you as you heard the evidence and in your own general wisdom, your common sense can answer. This is all we ask. This is all that you promised. This is all that we expect. We employ you to fulfill that promise because we feel that there is a very very serious wrong that is attempted to be perpetrated against Michael James and his innocence is unquestionable at this point based on the evidence in the case as presented. There has been nothing to establish his guilt. Nothing to establish his guilt beyond a reasonable doubt, nothing at all. We hope that you keep that in mind as you go into the witness room, maintain the promises that you have given us, and then review all of the evidence in its best light as to what is fair. We trust that you would carry this duty forthright in a responsible manner. [22] I do have to say on behalf of Mike we thank you for sitting here and your patience and your indulgence through this whole ordeal and we really do believe that you will fulfill your promise to us. We are not asking you to find him innocent on a promise. We ask you to find him innocent on the evidence of this case, the facts and what are the facts. You know them as well as I. I have just stated them as well as I could. I could go on and on. I think that it is very unlikely that someone during this time, this period, would not have been seen by the passing traffic on East Main Street during the noon hour, would not have been seen by Mr. Bates during this period at any time and we hope that you keep all of this in mind and more or less give us the due consideration that we should be afforded.

Again, I thank you for your patience and your participation and attention to this case, and please, be just. Thank you.

[23] JUDGE MEIGS:

Mr. Corns?

MR. CORNS: May it please the Court, Mr. Peale, ladies and gentlemen. On behalf of the Commonwealth, we want to thank each of you for your service and your attention. I know there must be times when it gets somewhat dull for you and there must be times when you wonder why a particular question or series of questions may not be asked or have been asked, but hopefully there is a reason for it

under the Rules of Procedure for not asking that particular question. I would like to call this rather than a closing argument a closing statement in which I will try to share with you some of our thoughts and some of our ideas and you see how they compare with your thoughts and with your ideas. One of the first things you will do when you go into the jury room will be to select a foreman or a foreperson and then, of course, you will take with you the instructions that the Court has given you. I will comment upon them and then try to recap briefly some of the evidence. The first one deals with second degree burglary. That is the classification with which this defendant is charged, and the Court says [24] you will find him guilty under this instruction if and only if you believe from the evidence beyond a reasonable doubt all of the following: That in this county on or about the first of May and before the finding of the indictment—there is no question about that phrase—certainly he was not indicted until after these offenses were committed, he entered unlawfully and without permission the dwelling of Donna Richardson. There was no requirement that he break in although the evidence shows that on this date in question he broke in by pushing out the bottom panel of the storm door, breaking out the glass, reaching through and unlocking the door, but in order to burglarize a building or a residence, there is no requirement that there be a break-in, only an unlawful entry. In fact, it can just be your hand. Maybe someone is going to be walking by the street, there is a wallet or a ring or something laying on the stand near a window, they reach in the window—that is an unlawful entry—that is a burglary. So you don't have to get your whole body inside the premises to be an unlawful entry but in this case the evidence shows that the person did gain access with their entire person in the premises, but he entered unlawfully [25] and without permission. There is no question she didn't give him permission to break into her house. That in so doing he knew that he did not have her permission. I think that speaks for itself, and that he did so with the intention of committing the crime of theft therein. There is no require-

ment he stole anything. Perhaps someone wants to break into the house—they think there is a lot of money there and they break in and the money not be there. The burglary is still complete if the intent was to commit the crime of theft, and as you will recall, Donna testified that the person who broke in on the second burglary went back and messed up her bed, the same area under that pillow of which the person who broke in a few days earlier on April 23 had stolen the pistol. So I think the evidence clearly shows an unlawful entry—there was no permission—and it was entered for the purpose of committing the crime of theft. Sgt. Evans testified about the fingerprint, one latent fingerprint found on the inside of the bottom portion of the storm door—one of the best prints that you could ever hope to find. He testified he can make an identification if there are seven to nine points. How many did he say he had—twenty-six identical. That is almost three times [26] the amount required. I don't see how you could ask for a more positive identification. How did his left fingerprint get on the inside of her rear storm door. There is no one ever told you from this witness stand that this defendant was ever inside the back part of the house. Donna Richardson said they only were in the front part of the house. Never in the back part. So I submit to you that when he pushed that storm door in and you are not apt to leave fingerprints if you are pushing it in with your arm or your hand and it slides, it is not going to leave any prints but when that comes loose and you reach in to pull it out, isn't it natural that you leave a fingerprint on there as you try to drag that back out and whoever did it threw it back behind it and it fell over in the weeds. Then, when you look at this defendant, how tall is he? Six feet eleven. Can you imagine, he is going to be leaving his fingerprint on the lower portion of the door. That is even low for me but you have six feet eleven. I am only five eight. What is his lower fingerprint going to be doing on the lower portion of the door, on the inside and then another little thing I think is extremely significant—it is the little points that tell the story oftentimes. Do you recall that [27] Donna told you that after the first burglary he came over to her premises and what was Donna—what was she and her

friend doing—nailing up the windows, weren't they. So he had been in there he knew, he knew you don't come back through the front window like whoever broke in a few days before on April 23, and he is not on trial for that but you can form your own conclusions about who committed the burglary on April 23. He is not charged with that, but he knew according to her testimony you don't gain access through the front windows because they were being nailed shut or down. Then there was some mild suggestion in cross examination of Sgt. Evans that the fingerprint had been forged. And Sgt. Evans indicated that he didn't know how in the world you could forge a fingerprint like that and move it from one place to another. He had read some papers that it might be possible—

MR. PEALE: Your Honor, I object. Sgt. Evans said that it was possible but not very likely.

JUDGE MEIGS: The jury will remember what the testimony was.

MR. CORNS: Everywhere you look and this I think is a strong feature of this case, what a young lady told you [28] from the witness stand is validated. You never found a single time in the evidence where he contradicts one thing that she told you, and she is not a trained police officer—she is not trained in that field at all. When this burglary occurred on April 23, she reported it, didn't she? That is what a law abiding citizen would do. She said I had a pistol stolen. She got the serial number and the next morning gave it to the police. That was put into NCIC—National Crime Information Computer. This gun was registered as being stolen that date. So she reported it. A few days later on May 1 when we have the burglary with which this defendant is charged, she again reported it, and his fingerprint was found. And now you come to May 6, the rape charge, and the Judge instructed you, you will find him guilty if you believe from the evidence beyond a reasonable doubt all of the following: That on or about May 6, 1981 and before the finding of the indictment herein, he engaged in sexual intercourse with Donna Richardson, and that is defined to mean regular sexual intercourse, and there is no requirement in that definition that any semen

fluid be deposited in the victim's body or on her person. It is the unlawful pentration [29] because it says he did so by forcible compulsion, did so by forcible compulsion and everywhere you look what Donna Richardson told you that day rings true. She said she was home, getting ready to come back to work somewhere around 12:30 and he comes in to use the phone. He grabs her from behind, tells her he has a gun and the gun is discharged. Now, we did not offer into evidence but it was put in because Mr. Peale wanted it, a small slug that was found on her floor. To the police officers they said it looked like a bullet from perhaps a 22 caliber pistol. We can't say for sure it came from a pistol or which one because it is too smashed. So we didn't offer it but it is there through the courtesy of the defendant for you to look at, but does that not validate her story. She was gone from the premises at this time. She had told the police about it. They came by and searched her premises and his after they got the search warrant, and they found this slug on the floor. How did it get there? How did it get there? Another thing she told you that she had no control over and I think this speaks to her truthfulness. She said this pistol had nine shells in it and it holds nine, and she said that one shot had been fired. How many shells, live rounds, were found in this pistol when [30] it was found in this bag a few hours later the same day, not a week, month or year later, in his possession—there were eight shells. There is no way that young lady could have known that, could she, if she hadn't been there, heard the shot. What if she had said there had been two shots fired and eight shells. Obviously that would dispute to some extent her testimony. She said one was fired, eight live rounds were found. That has never been explained how she knew that. The reason shw knew it, she was there when he shot, accidently discharged the pistol. She said he bound her hands with two pieces of strips of cloth. Isn't it strange that he had a bag on his person a few hours later and had two pieces of cloth in it, not three, not one, not seven. How could she have known that if she hadn't been there and this hadn't taken place. There is no way anyone could know that. That has never been explained except what the record shows is the truthful state-

ments of this victim. She said one of the cloths, the one used to gag her, had a knot in it. One of these had a knot in it in the bag. I suggest to you the greatest psychic, greatest crystal gazer in the world wouldn't know that. Only people who would know that is the victim and the person who did it, and the evidence show that those are the two. [31] The young lady sits behind you this afternoon, the defendant sits over here. Ed Taylor said that he untied that knot when he got it down to the lab and cut that portion out to make the test. So you have got the eye witness testimony, you got the circumstances. Witnesses may make mistakes in their testimony. I submit to you circumstantial evidence doesn't lie but you have got both in this case; the person in whose mouth this gag was placed was a secreter. Now, if Donna Richardson is not a secreter that totally destroys their premise, doesn't it, but if she is a secreter which the record shows she is, it confirms, it supports what she says. Not only that but the person who had that in their mouth is a group A blood factor person. She is group A. What more could you ask. Everywhere you look she told the truth. Now, I am going to make a little statement. How do we know what this defendant's wife's blood type is. There is no way we can know. That is not available to us. She is not charged with the crime. I submit to you if her blood type was group A, you would have heard it from this witness stand, but I don't recall that Lisa James came and testified. So why do they want to run you down that trail? Now, in order to constitute the act of rape, there must be the penetration, must be [32] by compulsion and the court has instructed you, and compulsion, forcible compulsion, and in the instruction it means, among other things, a threat express or implied. Here we had a very express threat. That overcomes earnest resistance by placing a person in fear of immediate death or physical injury. This young lady told you time and time again, he said, I will kill you, I will kill you. He is six feet eleven. She is much smaller in stature. I submit to you that would cause more people to submit which is what it did in this case, it is what it did in this case. So I think the record clearly shows he committed the offense charged. We didn't offer in evidence

because of various reasons primarily that the semen fluid was too limited to type any evidence on the semen fluid that Mr. Taylor found but Mr. Peale asked him about it, and that is another confirming factor. You don't have to find it in any quantities. The fact that he found it shows, the presence of that acid phosphatase shows someone had left a trace of semen fluid on her within the recent past. It was in the tampon. It was in the vaginal smears, the vaginal swabs. It was even on that white towel he said should have been introduced but it was mentioned by [33] Mr. Taylor. Why don't we introduce every piece of evidence they gather up? What in the world would you want to see all the pieces of linen and bedclothes and everything they gathered if they really had no relationship. So we try only to introduce evidence which we believe has positive evidentiary value. Can there be any doubt in your mind but that she was detained for three or four hours that day. David Adams who testified here, he is a supervisor in the state Public Defender's office. Now you can imagine that the state Public Defender's office and the Commonwealth Attorney do not get together on many cases. We are on opposite sides but here is a man who is in the office and reresents the entire Commonwealth of Kentucky to provide counsel for defendants, comes and sits on this stand and tells you the emotional status of this young lady that afternoon, and he didn't show that he had any doubt, did he, that she had had this horrible experience that she had described to him. He insisted that she report it. She said I am afraid that he will kill me, and who wouldn't be. He is the next door neighbor. How can you be assured that the police are going to be able to apprehend him and get him arrested to protect you before he gets to you, but she reported it to her boss, didn't she, as soon as she got there, [34] she told him. He said she got there sometime between 4:30 and 5:00 and the state police records show they were called at six o'clock. So within an hour after that, she had called them. To me every way you look the evidence supports completely what Donna Richardson told you. Then lastly, the charge on receiving stolen property—this is a misdemeanor for which the defendant can get up to twelve months in the

county jail, a fine of $500.00 or both. In order to prove the charge of receiving stolen property, the Court has told you that he must have possessed the pistol or he had it in his control, he had it in the bag. I possess this pencil, got it in my hand. It doesn't say you have to own it, just possess it. That the pistol had been stolen—there is no question that this pistol was stolen. It is the same serial number that she gave the officers on the morning of April 24th and put it in NCIC. How do you tell it is the same gun? By the serial number. That is the way that you identify it. That the defendant knew that it was stolen. I think the record speaks for itself on that. Not only that, he is carrying it concealed, loaded. Those are all factors which indicate clearly he knew it was stolen. That in possessing the pistol he had no intention to return it to the owner. There [35] is no evidence to suggest he ever intended to return it to the owner. In fact he told the officers you recall, Detective Courtney said, he said, some dude gave him that bag as he was leaving the gym. All of the officers said that they saw him pick it up, off the bleacher area and walk out the door with it. So for reasons I have mentioned and many others of which I am sure you are cognizant, we ask you to find him guilty on each of the offenses. As we talked at the beginning when the jury was selected, we only had to prove him guilty beyond a reasonable doubt, and that is what the court has told you, not beyond all doubt and not beyond a shadow of a doubt, but honestly in this case, it appears from the record that we have proven him guilty beyond all doubt, beyond all doubt. He committed all three of these offenses. So then it gets to the verdict form. The court has read that to you. The first one deals with burglary. We trust you will fill in Section B, we the jury find him guilty under Instruction No—that would 1 where it deals with burglary, and fix his punishment at ____ years in the penitentiary. It could be anywhere from five to ten, six, seven, eight, nine and ten. The same thing on the rape. Just fill in the instruction number that applies to rape and that begins at ten and goes any [36] number to twenty—fifteen, seventeen, any number between those two. Then the last one, the misdemeanor, receiving stolen property. You could fix one month, ten

months, nine months, twelve months, $500.00 fine or any combination of those. In closing we try to present the case to you as simply and as directly as I know how to do it without emotion because I want you to decide the case on logic, not emotion, not passion, or anything like that. The record shows this defendant has gone from bad to worse. He has gone from offenses against property to offenses against person. Stealing from another is bad enough—that is an offense against property. It is an even worse offense against property to break into another's home because whether it be a small apartment like this young lady had or whether it be the finest house in Franklin County, everyone has the right to have their home secured, but this defendant has no regard for the home of this particular person—no regard for it whatsoever, and not only that, he gets so blatant and calloused he decides to commit an offense against person. I cannot think of a much more blatant offense to commit against a young lady than the act that this defendant committed. He deserves no sympathy. He is twenty-nine years of age. He is in college. He knows what he is doing. So I know of no [37] reason to extend him any mercy or any sympathy. Can you imagine really the mental anguish that that young lady must have experienced three or four hours. Can you imagine that—this defendant—six feet eleven and a pistol in his possession. Can you imagine that and he kept her captive there. How long does it take to walk from those two houses—as long as it would take you to walk from here to the back of the courtroom—he on the outside pushing her along and she with this hood over—hanging down—who is going to notice that. No one would pay any attention to that driving down East Main Street. No one. No one did, but think of the anguish that she must have gone through and I submit to you that she was able to keep herself under control which was fortunate for her or else he might be on trial today for even a more serious offense. So I ask you to find him guilty on all three of the offenses and to fix what you believe to be a reasonable punishment. That will be justice in this case and hopefully it will send out a warning to others in this community who might be tempted to do likewise—that if you do it, don't expect to come in here and get mercy—

Rendered: March 30, 1983
To be published

Supreme Court of Kentucky

Appeal from Franklin Circuit Court
Honorable Henry Meigs, Judge

MICHAEL P. JAMES, APPELLANT

v.

COMMONWEALTH OF KENTUCKY, APPELLEE

82-SC-394-MR
Date: APR 20, 1983

OPINION OF THE COURT BY JUSTICE STEPHENSON
Affirming

Michael P. James was tried and convicted for the offenses of second-degre burglary, KRS 511.030, first-degree rape, KRS 510.040, and receiving stolen property, KRS 514.110. At the persistent felony offender phase of the trial, James was convicted as a first-degree persistent felony offender and the conviction for first-degree rape was enhanced to life imprisonment. James was sentenced to life imprisonment on the persistent felony offender charge and to ten years' imprisonment on the burglary charge to run concurrently. He was sentenced to twelve months in jail on the receiving stolen property charge to run consecutively with the two felonies. We affirm.

James' first assertion of error is that the trial court erroneously declined to sever the charges against him. He argues that the requirements for joinder under RCr 6.18 are not present. The three crimes here were closely related in character, circumstances, and time, and we are of the opinion there is no showing of abuse of discretion and prejudice in the joinder of the offenses for trial. Seay v. Commonwealth, Ky., 609 SW 2d (1981) and Cardine v. Commonwealth, Ky., 623 SW 2d 895 (1981). The burglary of the victim's apartment, the rape and finding property stolen from the apartment in the possession of James all occurred within a two-week period.

The evidence of the broken pane of glass and James' fingerprint in our opinion is sufficient evidence to submit the charge of burglary to the jury.

"If under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict." Trowel *v.* Commonwealth, Ky., 550 SW 2d 530, 533 (1977).

Mere possession of the stolen pistol is sufficient to submit the case to the jury. KRS 514.110(2). James offered no explanation for his possession of the pistol, and there is nothing in the evidence to show that it was unreasonable for the jury to find a guilty verdict.

When arrested on the rape charge, James was carrying a gym bag. The arresting officer asked James about the bag and was informed by James that someone had handed it to him and that he did not know to whom it belonged. Later, while the gym bag was in the police cruiser and officers were executing a search warrant by searching James' house, one of the officers ran his hand under the gym bag on the car seat and felt what seemed to him to be a pistol. He then proceeded to open the bag and found a pistol, which was later identified by the victim as being the pistol stolen from her apartment some days prior to the rape.

James moved to suppress the evidence of the pistol on the ground of an illegal search and seizure. He did not testify at the suppression hearing. At the hearing, the arresting officer testified that James had denied being owner of the bag and that some "dude" had handed it to him as he left the gymnasium. The trial court denied the motion to suppress. James argues the major premise that the Commonwealth must rely on the "plain view" and "exigency" cases in this situation and that these propositions do not apply. This argument misses the real question, which is analogous to the expectation of privacy cases. We are of the opinion the search here did not violate any expectation of privacy on the part of James. He denied being owner of the bag. There is no "search" here for purposes of the Fourth Amendment, and there is a total absence of any legitimate expectation of privacy. Cf. Sussman *v.* Commonwealth,

Ky., 610 SW 2d 608 (1981), and Rawlings *v.* Kentucky, 448 U.S. 98, 100A S.Ct. 2556, 65 L.Ed. 2d 633 (1980).

James request that the trial court give an "admonition" to the jury that no emphasis be given to James' failure to testify. This request was denied by the trial court. In his argument on this appeal James attempts to equate this request for an admonition with a request for an "instruction" on failure of a defendant to testify. Carter *v.* Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed. 2d 241 (1981), held that a state trial judge has the constitutional obligation to give a prophylactic instruction upon proper request to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify. There is a vast difference in a request for an admonition and a requested instruction. James was entitled to the instruction, but did not ask for it. The trial court properly denied the request for an admonition.

The proof of the Commonwealth on the persistent felony offender phase of the trial was that James entered a guilty plea in Nebraska to a felony charge of forgery in 1972 and was sentenced to probation for a period of two years. Later that year in Virginia, James entered a guilty plea to murder and was sentenced to twenty-eight years' imprisonment. James was on parole from this conviction when he committed the offenses here.

James argues that the Nebraska conviction does not meet the requirements of KRS 532.080(2)(a):

> "(2)... As used in this provision, a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided:
>
> "(a) That a sentence to a term of imprisonment of one year or more or a sentence to death was imposed therefor; ...

The Commentary accompanying this subsection in the Kentucky Penal Code, Final Draft November 1971, p. 347, is as follows:

> "Subsection (2) sets forth a definition of a previous felony conviction. It requires in Subdivision (a) that the previous offense must have been accompanied by a

sentence of imprisonment for one year. *This requirement seeks to account for the possibility of conviction from a state which has a distinction between felony and misdemeanor that is different from that used in this state.* Thus, although such conviction is for an offense designated in that other state as a misdemeanor, it can be treated as a felony for purposes of this statute if it carried a penalty of one year or more." (Emphasis added.)

We have consistently relied upon the Commentary as an expression of legislative intent. It is apparent that the statute does not require actual imprisonment as was the case in the former statute, and reasons for the use of the term "imprisonment" in and of itself are fully explained in the Commentary. Here the offense in Nebraska was a forgery, which is a felony in this state.

Finally James argues that the trial court erroneously ordered the misdemeanor conviction to be served consecutively with the felony convictions. James argues that our opinion in Powell *v.* Payton, Ky., 544 SW 2d 1 (1976), should be applied to the situation here. It is true that as a general proposition KRS 532.110(1) construed together with KRS 532.090 and KRS 532.060 mandates that a misdemeanor sentence be served concurrently with the indeterminate sentence for a felony. That proposition would obtain here save for the application of KRS 533.060(2) which provides in part that when a defendant "is convicted or enters a plea of guilty to a felony committed while on parole, ... the period of confinement for that felony shall not run concurrently with any other sentence."

The legislature has determined that offenses committed while on parole shall be dealt with in a harsher manner, and this clear expression of the legislature takes this case out of the rule in *Powell.*

The judgment is affirmed.

All concur.

Supreme Court of the United States

No. 82-6840

MICHAEL P. JAMES, PETITIONER,

v.

KENTUCKY

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of Kentucky.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 17, 1983

Office - Supreme Court, U.S.
FILED
AUG 18 1983
ALEXANDER L. STEVAS
CLERK

NO. 82-6840

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

MICHAEL P. JAMES — PETITIONER

v.

COMMONWEALTH OF KENTUCKY — RESPONDENT

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On Petition for Writ of Certiorari to the Supreme Court of Kentucky

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEVEN L. BESHEAR
ATTORNEY GENERAL

BY: PENNY R. WARREN
ASSISTANT ATTORNEY GENERAL
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601-3494
Telephone: (502) 564-4025

COUNSEL FOR APPELLEE

August 11, 1983

COUNTERSTATEMENT OF THE QUESTION PRESENTED

WHETHER THE KENTUCKY COURT'S DECISION CONSTITUTES AN INDEPENDENT AND ADEQUATE STATE GROUND WHEN IT IS BASED ON CLEAR AND LONG-STANDING PRECEDENTS THAT A REQUEST FOR AN ADMONITION IS NOT THE EQUIVALENT OF A REQUEST FOR INSTRUCTION AND THAT PROCEDURAL RULES MUST BE STRICTLY FOLLOWED; ALTERNATIVELY, WHETHER THE ALLEGED ERROR IS HARMLESS?

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OPINION BELOW

Respondent respectfully corrects petitioner's statement that the opinion of the Kentucky Supreme Court "is not to be published." The opinion was published. James v. Commonwealth, 647 S.W.2d 794 (Ky. 1983). (Appendix, hereinafter A., pp. 1-3.)

JURISDICTION

Respondent accepts petitioner's statement of the jurisdictional facts.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner seeks relief before this Court under the Fifth and Fourteenth Amendments to the United States Constitution and accurately sets forth the relevant provisions.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

WHETHER THE KENTUCKY COURT'S DECISION CONSTITUTES AN INDEPENDENT AND ADEQUATE STATE GROUND WHEN IT IS BASED ON CLEAR AND LONG-STANDING PRECEDENTS THAT A REQUEST FOR AN ADMONITION IS NOT THE EQUIVALENT OF A REQUEST FOR INSTRUCTION AND THAT PROCEDURAL RULES MUST BE STRICTLY FOLLOWED; ALTERNATIVELY, WHETHER THE ALLEGED ERROR IS HARMLESS?

COUNTERSTATEMENT OF THE CASE

On April 23, 1981, the female victim in this case returned home from a university night class and found her front porch light unscrewed and her front door, which is always locked, inexplicably ajar (TE 182-184, 199). Examination of her apartment revealed her bed pillows "messed up" and the .22 caliber pistol she kept there was missing (TE 183-184). Early

the next morning she obtained the serial number of the gun and reported the burglary (TE 183-184, 198). Police officers investigating found evidence of possible entry through a front porch window (TE 199-201). Appellant and his wife, who were next door neighbors, observed the victim nailing her windows shut and inquired about the incident (TE 203-204).

On May 1, 1982, the victim came home from work and discovered the lower glass panel of her back storm door had been removed and a small pane broken out of the back door (TE 183-185). Again the pillows of her bed were messed up but nothing apparently taken this time. (Id.) She immediately told a neighbor who called the police (TE 185). Officer Clark found the storm door panel in some bushes beneath the porch (TE 222). One latent print on the inside of the glass panel was subsequently identified as appellant's by twenty-six positive comparison points (TE 222, 224, 290-293).

On May 6, 1983, the victim came home for lunch and was about to return to work around 12:30 p.m. when appellant knocked at the door and asked to call a doctor for his ill wife (TE 185-186). Although the victim barely knew appellant, he and his wife had used her phone on a few occasions during the past several months and she thought nothing of the request (TE 186, 203-205). As she dialed the number, appellant grabbed her mouth, poked a gun in her side, and threatened to kill her if she did not follow instructions (TE 186). While attempting to push hard to close the front door with his other hand, appellant accidentially fired his gun and became angry (TE 187). [During the subsequent investigation police officers found what appeared to be a .22 caliber bullet on the floor

near the door and a slash mark where it apparently hit the wall (TE 235, 263).]

Appellant took his victim into the bedroom where he bound her hands with a strip of cloth and gagged her mouth with a similar strip having a knot already tied in it (TE 187). Appellant leaned her across the bed, covered her head with bed linens and then proceeded to walk about the house and search her purse. (Id.) After a long time he stood her up, pulled the hood of her sweater over her head and took her to his apartment, after checking to make sure no one was watching (TE 188). The victim was reminded she would be killed if she tried anything. (Id.) After ensuring they were not seen, he took her to the bedroom, ordered her to undress and to climb on the towel he had placed on the bed (TE 189). After raping her, appellant sat on the bed for a long time and would not allow her to dress. (Id.) Subsequently, appellant permitted her to get dressed but then told her to go in the bathroom and wash (TE 190).

Appellant seemed unable to decide what to do with her and sat in the bedroom for a long time and then in the living room where she was told to sit in the middle of the floor. (Id.) At one point appellant mentioned putting her in the attic (TE 191). Throughout the afternoon the victim promised to tell no one and kept suggesting reasons he should let her go before anyone came home (TE 190). She also said she could not explain to her father if the second gun he purchased for her was missing from her purse. (Id.) Late that afternoon appellant was finally persuaded to return her purse and let her go (TE 190-191). Her supervisor testified she arrived between

4:30 and 5:00 p.m. and was visibly upset (TE 322-324). After calming her down and learning of the incident, he urged her to call the police, but the victim explained she was afraid she would be killed if he was not immediately apprehended (TE 192, 324-325).

She left work and went to a girlfriend's and then to a friend who called the police at approximately 6:00 p.m. (TE 192, 237-238, 255). Following the police interview during which she gave them appellant's first name (the only name she knew) and address, the victim was taken to the hospital for examination and tests (TE 192, 227, 256-257). Subsequent lab analysis revealed semen on the vaginal swabs, vaginal smear, a Tampon, and her panties (TE 320).

Appellant's last name was obtained through fire department records of a recent fire and an arrest warrant obtained (TE 256-257). At his residence, appellant's wife said he was refereeing a basketball game at Kentucky State; therefore, four officers proceeded to the gym where they found an intramural game in progress and recognized appellant by his height, 6 feet 11 inches. (TE 103, 228, 257, 270). When the game concluded in a few minutes, appellant picked up a gym bag from the bleachers and began to leave (TE 229, 258, 270). He was stopped at the door and placed under arrest outside, the gym bag being taken from him at the time (TE 230, 258, 270). The bag was placed in the front seat of the police cruiser and appellant in the back (TE 230). At that time and when questioned later, appellant repeatedly denied knowledge or ownership of the gym bag and said it was handed to him by "some dude" (TE 106, 238, 274, 275). Appellant declined to consent

to a search of his residence and was transported to headquarters while a search warrant was obtained for the apartment (TE 230-231). Appellant's wife apparently consented to the search at the residence (TE 86, 231, 259).

During the execution of the search, Trooper Sparks and Detective Courtney, Frankfort Police Department, went to the cruiser for additional evidence bags (TE 111, 232, 272). Reaching for evidence bags under the gym bag, which remained on the front seat, Trooper Sparks felt what seemed through the canvas to be a gun. (Id.) He took the gym bag inside where it was found to contain the .22 caliber pistol reported stolen by the victim on April 23 and two cloth strips, one with a knot in it (TE 232-234, 272-273). During the suppression hearing Detective Courtney stated while in the cruiser he raised the pistol without removing it to ascertain it was a gun and then took the bag inside where the contents were removed (TE 112). At trial the testimony from both officers was that the bag was opened in the house, not in the car (TE 232, 245, 247, 272, 279).

Analysis of the cloth strips revealed saliva of the Group A secreter in the knot and a blood test disclosed the victim was a Group A secreter (TE 313-314). A towel from appellant's bathroom contained semen, but in all instances the quantities of semen were too limited to determine blood type (TE 318-320).

The defense presented two witnesses, one of whom said he was in the driveway from approximately noon until late afternoon and that he never saw the victim (TE 337-345). He recalled seeing appellant leave around 2:00 p.m. and not return (TE 342). He also testified he was in the basement of

appellant's apartment with the owner around 12:30 p.m. but heard nothing except a record player (TE 341). The building owner said he often showed Mr. Bates the progress being made in the basement renovation but could not recall any specific date (TE 351-352).

After a jury recess, the proceedings continued as follows:

> "Mr. Peale [Defense Counsel]:
>
> We have closed and has (sic) a matter in regards to the instructions.
>
> OFF THE RECORD
>
> Mr. Peale:
>
> Note that the defendant objects to several of the instructions being given to the jury.
>
> Judge Meigs:
>
> Overruled.
>
> Mr. Peale:
>
> The defendant requests that an admonition be given to the jury that no emphasis be given to the defendant's failure to testify which was overruled." [TE 425-426; A. 4-5].

The jury was then instructed and returned a verdict of guilty on charges of second-degree burglary, first-degree rape and receiving stolen property. (TR 37-38.)

At the second stage of the bifurcated proceeding evidence was introduced regarding the charge of first-degree persistent felon, and the defendant testified in his own behalf (TE 360-395). Evidence of convictions for forgery in Nebraska and murder in Virginia were introduced (TE 361-365). Petitioner was found guilty and a sentence of life imprisonment imposed in accordance with the jury's recommendation (TR 53-54).

On direct appeal to the Kentucky Supreme Court petitioner raised six issues including:

> "Appellant's Convictions Of The Principal Offenses Were Obtained In Violation Of Due Process Of Law Where The Trial Court Refused To Admonish The Jury Regarding Appellant's Right Not To Testify."

The Commonwealth responded that the alleged constitutional issue was not preserved for appellate review in that petitioner improperly attempted on appeal to equate "admonitions" and "instructions," and that, even if the question were preserved, any error was harmless beyond a reasonable doubt. This question was decided by the Kentucky Supreme Court as follows:

> "James requested that the trial court give an 'admonition' to the jury that no emphasis be given to James' failure to testify. This request was denied by the trial court. In his argument on appeal James attempts to equate his request for an admonition with a request for an 'instruction' on failure of a defendant to testify. Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), held that a state trial judge has the constitutional obligation to give a prophylactic instruction upon proper request to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify. There is a vast difference in a request for an admonition and a requested instruction. James was entitled to the instruction, but did not ask for it. The trial court properly denied the request for an admonition." James v. Commonwealth, 647 S.W.2d 794, 795-796 (1983).

REASON FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION IN THAT THE KENTUCKY SUPREME COURT DECIDED PETITIONER'S CASE ON AN INDEPENDENT AND ADEQUATE STATE PROCEDURAL GROUND AND DECLINED TO RENDER AN ADVISORY OPINION ON WHETHER THE CLAIM OF ERROR WOULD, IN ANY EVENT, BE DEEMED HARMLESS BEYOND A REASONABLE DOUBT.

Petitioner invokes this Court's jurisdiction on the claim that: "THE OPINION OF THE SUPREME COURT OF KENTUCKY

REPRESENTS AN OBVIOUS ATTEMPT BY THAT COURT TO CIRCUMVENT THE MANDATE OF THIS COURT IN CARTER V. KENTUCKY. . . ." He predicates his claim on the assumption that a request for an "admonition" on his right not to testify is equivalent to a request for an "instruction" under Carter v. Kentucky, 450 U.S. 288 , 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981). The Commonwealth respectfully submits that the state court decision followed well established procedural rules, rather than some arbitrary denial of an opportunity for petitioner to present his constitutional claim. Thus, the state court decision rests upon independent and adequate precedural grounds which prevent direct review.

As early as 1922, in Miller v. Noell, 193 Ky. 659, 237 S.W. 373 (1922), the highest court in Kentucky made it clear that there is a substantial difference between an "admonition" and an "instruction."

> ". . .[A]n 'admonition' is any authoritative oral communication or statement by way of advice or caution, made by the court to the jury during the trial of a case, respecting their duty or conduct as jurors, the admissibility or nonadmissibility of evidence offered by the parties, or the purpose, if competent only for a particular purpose, for which any of that admitted might or should be considered by them. But by the Civil Code of Practice and the courts of the state the term 'instructions' has a wholly different legal meaning. The instructions are from the court and addressed to the jury, and contain the law of the case by which they are to be guided and controlled in arriving at a verdict." Id. at 374. [Emphasis added.]

Miller was an action for slander in which counsel attacked the trial court's two "instructions" advising the jury certain testimony was to be considered only insofar as it bore on the question of intentional malice. The court took the opportunity to clarify the substantial differences between these

"admonitions" and written instructions. Id. Then noting there was no objection to the admonitions, the court declined to consider the merits of the claim.

Since Miller, the Kentucky courts have consistently and repeatedly adhered to the distinction between admonitions and instructions as the following cases illustrate. In Brown v. Simpson, 293 Ky. 755, 170 S.W.2d 345 (1943), a civil action for damages for assault and battery, appellant complained that the trial court's admonition limiting the effect of reputation evidence was incomplete. Citing Miller, the appellate court noted the absence of any objection and declined to rule on the alleged error in the admonition. Id. at 347. The opinion continued:

> "This Miller case also disposes of Brown's contention that the admonition was an instruction and that the court having given it sua sponte it was incumbent upon him to give it correctly, by pointing out that an 'admonition' is but an oral statement by way of advice made by the court to the jury during the trial respecting the purpose for which such evidence may be considered; while 'instructions' are always written, unless the parties agree otherwise, and contain the law of the case which guides the jury in reaching a verdict." Id.

In Weichhand v. Garlinger, Ky., 447 S.W.2d 606 (1969) the court held it was error, but harmless error, to give an admonition that evidence of a criminal conviction was not conclusive on the question of negligence in a related civil action. In discussing the issue, the court again emphasized the distinction between requests for instructions and admonitions.

> "On the trial of the instant case evidence of the criminal conviction was admitted, over Garlinger's objections. He made no request, at the time of admission, for any admonition. However, at the close of the trial he requested an instruction that the criminal conviction could be considered as evidence of negligence but was not

> conclusive. The trial court refused to give such an instruction but did give an admonition to that effect." Id. at 610. [Emphasis by the Court.]

Additionally, Kentucky Rule of Criminal Procedure [hereinafter RCr] 9.54 provides:

> (1) It shall be the duty of the court to instruct the jury in writing on the law of the case. The instructions shall be read to the jury prior to the closing summations of counsel.
>
> (2) No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specificlly the matter to which he objects and the ground or grounds of his objection.
>
> (3) The instructions shall not make any reference to a defendant's failure to testify unless so requested by him, in which event the court shall given an instruction to the effect that he is not compelled to testify and that the jury shall not draw any inference of guilt from his election not to testify and shall not allow it to prejudice him in any way.

Subsections (1) and (2) of this Rule have been in effect since March 1, 1974, and Subsection (3) became effective September 1, 1981, four and one half months before petitioner's trial. Kentucky courts have consistently held, in accordance with Subsection (2), that no claim of error regarding instructions may be raised on appeal unless a proper instruction was tendered or the specific grounds for an objection were presented to the trial court. See, for example: Sampson v. Commonwealth, Ky., 609 S.W. 2d 355, 360 (1980); Wilson v. Commonwealth, Ky., 601 S.W.2d 280, 285 (1980); Nickell v. Commonwealth, Ky., 565 S.W.2d 145, 148 (1978); Long v. Commonwealth, Ky., 559 S.W.2d 482, 484-485 (1977); Eversole v. Commonwealth, Ky., 550 S.W.2d 513, 515-516 (1977); Hunt v. Commonwealth, Ky., 466 S.W.2d 957, 959 (1971); McCranney v. Commonwealth, Ky., 449 S.W.2d 914, 915 (1970).

Petitioner herein not only failed to tender a proper written instruction or state specifically his grounds for objection to the instructions given but also asked for improper relief in the form of an "admonition" that "no emphasis" be given to the defendant's failure to testify. Counsel did not refer to the court's written instructions as admonitions in the previous breath. (TE, 425, A.4.) He correctly referred to them as "instructions." Yet he plainly chose the term "admonition" seconds later when he stated a request for relief. As recently reiterated, in a slightly different context, in Hopewell v. Commonwealth, Ky., 641 S.W.2d 744 (1982):

> "The appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court." Id. at 745.

The present case bears a strong similarity to the claim raised in Wolfe v. North Carolina, 364 U.S. 177 (1960) where the petitioner alleged the independent procedural state grounds relied upon by the North Carolina State Court were untenable and inadequate. This Court held there was no federal question presented after reviewing North Carolina decisions consistently and repeatedly applying the same procedural rules. As stated therein:

> "Examination of the whole course of North Carolina decisions thus precludes the inference that the Supreme Court of North Carolina in this case arbitrarily denied the appellant an opportunity to present their federal claim. * * * 'Without any doubt it rest with each state to prescribe the jurisdiction of its appellate courts. The mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise, and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon question of local or general law.' [Citations omitted.]

> '[W]hen as here there can be no pretence that the [state] court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong.'" Id. at 194-195.

The North Carolina Supreme Court did not decide the federal question raised "because of the requirement of rules of state procedural law within the constitutional power of the states to define, and here clearly delineated and evenhandedly applied." Id. at 196. Similarly, the Kentucky Supreme Court declined to decide whether there was constitutional error in the failure to give an instruction on the right not to testify because no such instruction was requested and petitioner failed to follow the rules of state procedural law.

The requirement of a contemporaneous request for an instruction, when an instruction is desired, serves similar important state interests as those enunciated in Wainwright v. Sykes, 433 U.S. 72, 87-90 (1977). When a state has so clearly explained the difference between an admonition and instruction and has plaintly set forth that to which the defendant is entitled, failure to honor state procedural rules may well encourage "sandbagging" and avoidance of the desirable result that state "proceedings be as free of error as possible." Id. at 89, 90. Accordingly, respondent submits that the petition should be denied.

Petitioner also argues that the state court did not decide the alleged error was harmless and attempts to infer that the court must have reached the opposite conclusion. Petitoner relies on Commonwealth v. McIntosh, 646 S.W.2d 43 (Ky. 1983), but no such conclusion can be supported by that

case. In McIntosh the court expressly stated:

> "Prior to the trial judge's instructions to the jury, the defense counsel requested an instruction on his election not to testify. The instruction was not given." Id. at 44.

By contrast, the court noted in the present case:

> "There is a vast difference in a request for an admonition and a requested instruction. James was entitled to the instruction, but did not ask for it. The trial court properly denied the request for an admonition." James, supra, at 795-796.

Since the question was not preserved for appellate review there was no need for the court to render an advisory opinion on the result if the question had been properly raised. It is the longstanding policy and practice of the Kentucky Supreme Court to refuse to render advisory opinions or to answer moot questions. See Dillingham v. Commonwealth, Ky., 249 S.W.2d 827, 828 (1952) and cases on preservation of instruction issues noted above.

Should this Court decide that the state decision does not rest upon an adequate state ground, then the cause should be remanded to the Kentucky Supreme Court for further consideration. See: Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). Respondent respectfully submits that the evidence of petitioner's guilt was overwhelming. He was positively identified as the perpetrator of the rape. Examination of the victim revealed semen in the vagina, and appellant that night had in his possession two strips of cloth like those used to bind and gag the victim. One stip was knotted and contained saliva of the same blood group as the victim's. Petitioner also had in his possession the pistol recently stolen from beneath the victim's pillows. His fingerprints were found on the inside of the storm door bottom panel the day it was

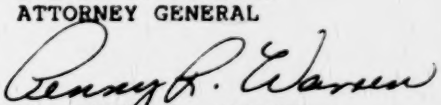
forcibly removed and the victim's pillows again disturbed. The state court should be given an opportunity to decide whether the failure to give an instruction is nonprejudicial error in this case pursuant to Chapman v. California, 386 U.S. 18 (1967).

CONCLUSION

For the foregoing reasons respndent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

STEVEN L. BESHEAR
ATTORNEY GENERAL



BY: PENNY R. WARREN
ASSISTANT ATTORNEY GENERAL
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601-3494

COUNSEL FOR APPELLEE

NO. 82-6840

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

MICHAEL P. JAMES PETITIONER

v.

COMMONWEALTH OF KENTUCKY RESPONDENT

CERTIFICATE OF SERVICE

I, Penny R. Warren, counsel for the respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 11th day of August, 1983, I served the petitioner with Brief for Respondent in Opposition to Petition for Writ of Certiorari by placing a copy of same in the United States mail, first-class postage prepaid, and addressed to the Honorable C. Thomas Hectus, Gittleman & Barber, 635 West Main Street, Louisville, KY 40202, Counsel for Petitioner.

Penny R. Warren

Penny R. Warren
Assistant Attorney General
Capitol Building
Frankfort, Kentucky
(Telephone: 502-564-4025

Counsel for Respondent

APPENDIX

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Michael P. JAMES, Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.

Supreme Court of Kentucky.

March 30, 1983.

Defendant was convicted in the Circuit Court, Franklin County, Henry Meigs, J., of second-degree burglary, first-degree rape, and receiving stolen property, and he appealed. The Supreme Court, Stephenson, J., held that: (1) trial court did not err in declining to sever charges against defendant; (2) evidence was sufficient to submit charge of burglary to jury; (3) search of gym bag did not violate defendant's Fourth Amendment rights; (4) trial court properly refused to give "admonition" to jury that no emphasis be given defendant's failure to testify; (5) prior out-of-state forgery conviction was properly considered in persistent felony offender phase of trial; and (6) trial court properly ordered misdemeanor conviction to be served consecutively with felony convictions.

Affirmed.

1. Criminal Law ⇐620(6)

Where crimes of second-degree burglary, first-degree rape, and receiving stolen property were closely related in character, circumstances, and time, defendant was not prejudiced by joinder of offenses for trial, and trial court did not abuse its discretion in declining to sever charges. KRS 510.040, 511.030, 514.110; Rules Crim.Proc., Rule 6.18.

2. Burglary ⇐45

In prosecution for second-degree burglary, evidence of defendant's fingerprint at scene of crime and his possession of stolen pistol was sufficient for jury. KRS 511.030, 514.110(2).

3. Searches and Seizures ⇐7(10)

Where defendant had told arresting officer that gym bag in his possession did not belong to him, but was merely handed to him by another, defendant had no legitimate expectation of privacy in bag, and thus could not claim that subsequent search of bag violated his Fourth Amendment rights. U.S.C.A. Const.Amend. 4.

4. Criminal Law ⇐787(2)

While criminal defendant was entitled to prophylactic instruction on jury's consideration of defendant's failure to testify, trial court properly denied defendant's request for "admonition" to jury that no emphasis be given to his failure to testify.

5. Criminal Law ⇐1202(1)

Where defendant's previous conviction in Nebraska was for forgery, which was felony in Kentucky, such previous conviction was properly considered in determining defendant to be persistent felony offender after subsequent Kentucky conviction, notwithstanding that defendant had not served time in prison on previous forgery conviction. KRS 532.080(2)(a).

6. Criminal Law ⇐991(1.5)

Where defendant was convicted of felonies while on parole for different crime, trial court did not err in ordering defendant's misdemeanor conviction to be served consecutively, rather than concurrently, with his felony convictions. KRS 532.060, 532.090, 532.110(1), 533.060(2).

Jack Emory Farley, Public Advocate, John Michael Brown, Gittleman & Barber, Louisville, for appellant.

Steven L. Beshear, Atty. Gen., Penny R. Warren, Asst. Atty. Gen., Frankfort, for appellee.

STEPHENSON, Justice.

Michael P. James was tried and convicted for the offenses of second-degree burglary, KRS 511.030, first-degree rape, KRS 510.040, and receiving stolen property, KRS 514.110. At the persistent felony offender phase of the trial, James was convicted as a

first-degree persistent felony offender and the conviction for first-degree rape was enhanced to life imprisonment. James was sentenced to life imprisonment on the persistent felony offender charge and to ten years' imprisonment on the burglary charge to run concurrently. He was sentenced to twelve months in jail on the receiving stolen property charge to run consecutively with the two felonies. We affirm.

[1] James' first assertion of error is that the trial court erroneously declined to sever the charges against him. He argues that the requirements for joinder under RCr 6.18 are not present. The three crimes here were closely related in character, circumstances, and time, and we are of the opinion there is no showing of abuse of discretion and prejudice in the joinder of the offenses for trial. *Seay v. Commonwealth*, Ky., 609 S.W.2d 128 (1981) and *Cardine v. Commonwealth*, Ky., 623 S.W.2d 895 (1981). The burglary of the victim's apartment, the rape and finding property stolen from the apartment in the possession of James all occurred within a two-week period.

[2] The evidence of the broken pane of glass and James' fingerprint in our opinion is sufficient evidence to submit the charge of burglary to the jury.

"If under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict." *Trowel v. Commonwealth*, Ky., 550 S.W.2d 530, 533 (1977).

Mere possession of the stolen pistol is sufficient to submit the case to the jury. KRS 514.110(2). James offered no explanation for his possession of the pistol, and there is nothing in the evidence to show that it was unreasonable for the jury to find a guilty verdict.

[3] When arrested on the rape charge, James was carrying a gym bag. The arresting officer asked James about the bag and was informed by James that someone had handed it to him and that he did not know to whom it belonged. Later, while the gym bag was in the police cruiser and officers were executing a search warrant by searching James' house, one of the officers ran his hand under the gym bag on the car seat and felt what seemed to him to be a pistol. He then proceeded to open the bag and found a pistol, which was later identified by the victim as being the pistol stolen from her apartment some days prior to the rape.

James moved to suppress the evidence of the pistol on the ground of an illegal search and seizure. He did not testify at the suppression hearing. At the hearing, the arresting officer testified that James had denied being owner of the bag and that some "dude" had handed it to him as he left the gymnasium. The trial court denied the motion to suppress. James argues the major premise that the Commonwealth must rely on the "plain view" and "exigency" cases in this situation and that these propositions do not apply. This argument misses the real question, which is analogous to the expectation of privacy cases. We are of the opinion the search here did not violate any expectation of privacy on the part of James. He denied being owner of the bag. There is no "search" here for purposes of the Fourth Amendment, and there is a total absence of any legitimate expectation of privacy. Cf. *Sussman v. Commonwealth*, Ky., 610 S.W.2d 608 (1981), and *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980).

[4] James requested that the trial court give an "admonition" to the jury that no emphasis be given to James' failure to testify. This request was denied by the trial court. In his argument on this appeal James attempts to equate this request for an admonition with a request for an "instruction" on failure of a defendant to testify. *Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), held that a state trial judge has the constitutional obligation to give a prophylactic instruction upon proper request to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify. There is a vast difference in a request for an admonition and a requested instruction. James

2.

was entitled to the instruction, but did not ask for it. The trial court properly denied the request for an admonition.

[5] The proof of the Commonwealth on the persistent felony offender phase of the trial was that James entered a guilty plea in Nebraska to a felony charge of forgery in 1972 and was sentenced to probation for a period of two years. Later that year in Virginia, James entered a guilty plea to murder and was sentenced to twenty-eight years' imprisonment. James was on parole from this conviction when he committed the offenses here.

James argues that the Nebraska conviction does not meet the requirements of KRS 532.080(2)(a):

> "(2) . . . As used in this provision, a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided:
>
> "(a) That a sentence to a term of imprisonment of one year or more or a sentence to death was imposed therefor; . . . ."

The Commentary accompanying this subsection in the Kentucky Penal Code, Final Draft November 1971, p. 347, is as follows:

> "Subsection (2) sets forth a definition of a previous felony conviction. It requires in Subdivision (a) that the previous offense must have been accompanied by a sentence of imprisonment for one year. *This requirement seeks to account for the possibility of conviction from a state which has a distinction between felony and misdemeanor that is different from that used in this state.* Thus, although such conviction is for an offense designated in that other state as a misdemeanor, it can be treated as a felony for purposes of this statute if it carried a penalty of one year or more." (Emphasis added.)

We have consistently relied upon the Commentary as an expression of legislative intent. It is apparent that the statute does not require actual imprisonment as was the case in the former statute, and reasons for the use of the term "imprisonment" in and of itself are fully explained in the Commentary. Here the offense in Nebraska was a forgery, which is a felony in this state.

[6] Finally James argues that the trial court erroneously ordered the misdemeanor conviction to be served consecutively with the felony convictions. James argues that our opinion in *Powell v. Payton*, Ky., 544 S.W.2d 1 (1976), should be applied to the situation here. It is true that as a general proposition KRS 532.110(1) construed together with KRS 532.090 and KRS 532.060 mandates that a misdemeanor sentence be served concurrently with the indeterminate sentence for a felony. That proposition would obtain here save for the application of KRS 533.060(2) which provides in part that when a defendant "is convicted or enters a plea of guilty to a felony committed while on parole, . . . , the period of confinement for that felony shall not run concurrently with any other sentence."

The legislature has determined that offenses committed while on parole shall be dealt with in a harsher manner, and this clear expression of the legislature takes this case out of the rule in *Powell*.

The judgment is affirmed.

All concur.

HOWARD D. STURGILL & SONS, Appellant,

v.

Timothy FAIRCHILD and Kentucky Workers' Compensation Board, Appellees.

Supreme Court of Kentucky.

March 30, 1983.

Appeal was taken from decision of the Court of Appeals reversing judgment of the

JUDGE MEIGS:

Ladies and gentlemen, I remind you once again of the admonition given before the recess and unless you indicate otherwise, I will assume that you have not discussed the case among yourselves nor allowed anyone to discuss it with you during the recess. Does the Commonwealth waive the call?

MR. CORNS:

We do, Your Honor.

JUDGE MEIGS:

Does the defendant waive the call?

MR. PEALE:

We do, Your Honor.

JUDGE MEIGS:

Call your witness. You have closed, I am sorry.

MR. PEALE:

We have closed and has a matter in regards to the instructions.

OFF THE RECORD.

MR. PEALE:

Note that the defendant objects to seveal of the instructions being given to the jury.

JUDGE MEIGS:

Overruled.

4

MR. PEALE:

The defendant requests that an admonition be given to the jury that no emphasis be given to the defendant's failure to testify which was overruled.

JUDGE MEIGS:

Ladies and gentlemen of the jury, these are your instructions as to the law applicable to the facts which you have heard from the witness stand in the course of this trial.

No. 1. You will find the defendant, Michael P. James guilty under this instruction if and only if you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Franklin County, Kentucky, on or about the first day of May, 1981, and before the finding of the indictment herein, he entered unlawfully and without permission the dwelling of Donna Richardson.

(b) That in so doing he knew he did not have such permission, and

(c) That he did so with the intention of committing the crime of theft therein.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than five

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ALEXANDER L. STEVAS.

No. 82-6840

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MICHAEL P. JAMES,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Kentucky

BRIEF FOR PETITIONER

C. THOMAS HECTUS
(Counsel of Record)
GITTLEMAN & BARBER
635 West Main Street
Louisville, Kentucky 40202
(502) 585-2100

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED FOR REVIEW

Is it a denial of a criminal defendant's Fifth and Fourteenth Amendment rights against compulsory self-incrimination and to due process of law where a state trial court denies a timely request for an "admonition" directing the jury that no adverse inference may be drawn from the defendant's failure to testify, where an "admonition" is the functional equivalent of the "instruction" mandated by this court in *Carter* v. *Kentucky?*

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OPINION BELOW

The opinion of the Supreme Court of Kentucky was rendered on March 30, 1983, and is to be published. [Joint Appendix, hereinafter JA, pp. 112-115].

JURISDICTION

The opinion of the Supreme Court of Kentucky was entered on March 30, 1983. No rehearing was sought. A timely petition for writ of certiorari was filed on May 27, 1983. On October 17, 1983 this Court granted the petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which states in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

The Fourteenth Amendment to the United States Constitution, which states in pertinent part:

> . . . nor shall any State deprive any person of liberty . . . without due process of law . . .

STATEMENT OF THE CASE

Michael P. James (hereinafter, petitioner) was indicted by the September, 1981 term of the Franklin County (Kentucky) Grand Jury, and charged with the offenses of burglary in the second degree; rape in the first degree; and, receiving stolen property over $100. [JA, pp. 3-4]. Further, petitioner was charged with being a persistent felony offender in the first degree. [JA, p. 4].

Trial commenced on January 18, 1982. Before the introduction of any evidence, petitioner's trial counsel

moved to sever the burglary from the rape charge on the grounds that the cumulative prejudice of the trial of different counts together would be "inconsistent with the presumption of innocence. . . ." [JA, p. 12]. The trial court overruled the motion "with the observation that even though it's a rebuttable presumption, the presumption of innocence is a fiction which is used only as another means of saying that a defendant cannot be convicted unless and until he is proven guilty beyond a reasonable doubt. And it ought to be worded that one charged with a crime should not be presumed guilty unless and until proven so beyond a reasonable doubt by solid, substantial, and credible evidence. I'm starting the crusade today." (JA, p. 13].

Trial counsel also moved to amend the indictment relating to petitioner's alleged status as a persistent felony offender (PFO) from first degree to second degree.[1] The trial court also overruled this motion. [JA, p. 17]. The prosecutor then declared his intention to impeach petitioner's credibility with his prior forgery conviction in the event that petitioner elected to testify. [JA, p. 17].

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[1] KRS 532.080(3) requires, *inter alia*, that a defendant have at least two (2) previous felony convictions to enhance punishment. KRS 532.080(2) (persistent felony offender in the second degree) requires only one (1) previous felony conviction. Although in petitioner's case either persistent felony offender in the first degree or persistent felony offender in the second degree would enhance the possible range of punishment from 10-20 years to 20 years-to-life imprisonment, persistent felony offender in the first degree is substantially more onerous in that KRS 532.080(7) precludes consideration of probation, shock probation,, or conditional discharge, and further, requires a minimum term of imprisonment of ten (10) years before eligibility for parole. Otherwise, convicted persons are eligible for parole after service of 20% of their term of imprisonment, but in no event more than eight (8) years must be served before eligibility for parole. 501 KAR 011 (1980).

During voir dire, petitioner's trial counsel attempted to explore the jurors' attitudes given the threat of impeachment:

(Mr. Peale): I want to ask you another question that I think's important, whether the fact that a person made a mistake would prevent you from considering the facts that will—Would it make you believe the fact that they are more likely to make another mistake at a later time?

I'll ask that again, whether the fact that a person made a mistake at some time in the past would make you feel that more than likely he made another mistake, or she made another mistake at a later point in time?

Mr. Foster: I think it depends on how many mistakes they've made beforehand. The first mistake I don't think it would cause any problems; but if someone had a history of making similar mistakes it would be a problem for me.

Mr. Peale: Mr. Foster?

Mr. Foster: That's right.

Mr. Peale: You think that knowledge of the fact that someone had made a mistake previously would prevent you from given due consideration to the facts or circumstances of the supposedly second mistake?

Mr. Foster: I'm not sure I understand.

Mr. Peale: The fact that one might have made a mistake at one time in the past and

they come in and made a second mistake, I am saying is it possible that the fact that you know of the first mistake would prevent you from hearing all the facts and circumstances of the second mistake to determine that, well, you know, they really wouldn't know what was going on?

Mr. Foster: One mistake? Is that what that means?

Mr. Peale: Yes.

Mr. Foster: No, that would not get in my way.

Mr. Peale: It wouldn't? Okay. Okay. It's a very involved and complicated question but I have my reasons for stating it as I did.

Mr. Foster: I understand that.

[JA, p. 27].

Later, petitioner's trial counsel attempted to inquire into the jurors' beliefs or opinions in the event that petitioner did not testify. However, the trial court precluded trial counsel from effectively pursuing this line of questioning:

(Mr. Peale): Mr. Rohrer, would the fact that in trying this case the defendant did not take the witness stand create an inference in your mind as to his innocence or guilt?

Mr. Rohrer: No sir.

Mr. Peale: Do you feel that you would still be able to afford him a presumption of innocence that he's entitled to?

Mr. Rohrer: Yes sir.

Mr. Peale: And still consider all the evidence as it was presented from this witness stand?

Mr. Rohrer: Yes sir.

Mr. Peale: Do any of you feel that you would form a decision in this case if the defendant chose not to testify?

Do you have any problems with that?

The Court: They just said they could try the case on the law and the evidence, Mr. Peale.

Mr. Peale: Well, Your Honor, again, this is one area that I think moves outside of the law and the evidence. It's one of personal attitude that there might be something to hide or that something of that nature that might be prejudicial to the defendant's case If that's possible, I'd like to know. I think they're obligated to tell me.

The Court: They have said they would try the case solely upon the law and the evidence. That excludes any other consideration, Mr. Peale.

Mr. Peale: Well, Your Honor, I've finished my voire [sic] dire. Defense passes the jury.

[JA, pp. 29-30].

The first witness for the Commonwealth was the prosecutrix, Donna K. Richardson. Ms. Richardson testified that on April 23, 1980, she returned to her home, when

she noticed that the light was out on the front porch. [JA, p. 30]. The lightbulb had been unscrewed from the socket, so that when it was screwed back in, the light came back on. [*Id*]. Also, her door was ajar. [*Id*]. After entering the house, she found that a pistol had been stolen from under her pillow. [*Id*]. She then identified the Commonwealth's Exhibit No. 1 (a pistol and a box) as the pistol and box which had been stolen from her home during the burglary.[2] [*Id*].

Ms. Richardson related that subsequently, on May 1, 1981, the glass had been taken out of her screen door in the kitchen and the locks were undone. [JA, p. 31]. Although nothing was missing from her apartment, the pillows on her bed had been messed up. [*Id*]. (This alleged unlawful entry constituted the burglary with which petitioner was charged).

Ms. Richardson said that on May 6, 1981, she went home from work for lunch. [JA, p. 32]. She stated that while she was at home, petitioner came to her apartment and asked to use the phone to call a doctor, saying his wife was sick. [*Id*]. As she started to dial a number of her own doctor, petitioner grabbed her mouth with his hand, put a gun in her side, and told her to hang up the phone. [*Id*]. She stated that petitioner told her to do as he said, or he would kill her. [JA, p. 33]. She said that when petitioner attempted to shove the front door closed, the gun went off into the floor. [*Id*]. According to Ms. Richardson, petitioner took her to the bedroom, where he tied her hands behind her back and gagged her mouth. Ms. Richardson stated that petitioner then told her they were going to go to his house. [*Id*].

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[2] Petitioner was on trial for receiving stolen property, related to his alleged possession of the pistol on the day of his arrest. However, he was not charged with the April 23, 1980 burglary.

Ms. Richardson stated that after going to petitioner's house, he told her to take her clothes off. [JA, p. 34]. Petitioner allegedly got a towel, layed it across the bed, and then engaged in sexual intercourse with her. [*Id*]. According to Ms. Richardson, petitioner then allowed her to wash up, and let her leave after she promised that she would not tell anyone. [*Id*]. Before leaving, she was able to secure from petitioner the return of her purse, which contained a second gun. [JA, p. 35].

After she was released, Ms. Richardson returned to work. [JA, p. 36]. Because she was frightened, she did not call the police until later that evening. [*Id*]. After the police were called, Ms. Richardson went to King's Daughters Memorial Hospital in Frankfort. [*Id*]. At trial, Ms. Richardson identified two cloth strips which had been seized from a gym bag purportedly belonging to petitioner as appearing to be the same strips that were used to tie and gag her. [*Id*].

The next witness for the Commonwealth was Officer Scott Clark. [JA, p. 50]. Officer Clark investigated the break-in at Donna Richardson's home on May 1, 1981. [JA, p. 51]. Clark dusted the windowpane from the rear storm door for fingerprints, and found one latent print on the inside glass. [*Id*]., He attached the latent print to an offense report, and gave it to Detective Courtney. [JA, p. 52].

Trooper John M. Sparks of the Kentucky State Police testified that on May 6, 1981 he transported Donna Richardson to the hospital. [JA, p. 54]. He received her blood sample from a nurse on duty. [*Id*]. After this, he went to petitioner's home with Detectives Owen and Courtney, and then proceeded to Kentucky State Univer-

sity, where petitioner was arrested. [JA, p. 55]. Trooper Sparks then identified a gym bag which was taken from petitioner on the evening of his arrest. [JA, p. 56]. The prosecutor then asked Sparks, "[d]id the defendant make any sort of a statement concerning how he came to have this weapon in his posssession at this particular time?" [JA, p. 58]. Sparks responded: "No sir. After advising the defendant of his rights, he did not make any statement whatsoever regarding anything." [*Id*].[3] Sparks identified a gun from the gym bag, which was the same gun previously identified by Ms. Richardson as the gun stolen from her apartment. [*Id*].

Trooper Sparks also testified that, in processing the victim's apartment, he discovered a smashed bullet laying on the floor near the doorway. [JA, p. 59]. The bullet appeared to have ricocheted off an interior wall behind the door. [*Id*].

The next witness was Detective Claude Owen of the Kentucky State Police. Detective Owen stated that on May 6, 1981, he contacted Detective Courtney, who told him that Donna Richardson had identified her assailant as a person named "Mike" who lived next door to her, but she didn't know his last name. [JA, p. 71]. After ascertaining petitioner's full name,[4] an arrest warrant was obtained for petitioner. [JA, p. 72].

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[3] Petitioner would note that this statement violates the holding of this Court in *Doyle* v. *Ohio*, 426 U.S. 610 (1976), prohibiting comment upon a defendant's post-arrest, post-*Miranda* exercise of his right to remain silent. Because there was no contemporaneous objection to either this statement, or a similar statement at trial by Det. Courtney (JA, p. 75), petitioner did not raise this claim in the Kentucky Supreme Court, nor does he do so here.

[4] Another Frankfort police officer, Officer Boetcher, recalled there being a fire next door to Donna Richardson at an earlier date. The Frankfort Fire Department apparently provided petitioner's full name to the investigating police officers. [JA, pp. 71-72].

Owen proceeded to petitioner's home. [*Id*]. Petitioner's wife advised the officers that petitioner was at Kentucky State University, coaching a basketball game. [*Id*]. After arriving at the University, the officers waited until the game ended, at which time petitioner was arrested. [*Id*].

The next witness for the Commonwealth was Detective Robert Courtney of the Frankfort City Police Department. When asked whether petitioner at any time explained to Courtney "how he happened to have in that duffle bag a gun which had been stolen from Donna Richardson," Courtney responded, over petitioner's objection, that "the only thing the defendant explained to me about the duffle bag was that he didn't know whose duffle bag it was." [JA, p. 74].

The next witness for the Commonwealth was Mr. James E. Evans, who was employed by the Kentucky State Police Identification Unit. After comparing the latent print taken from the storm door of the residence of Donna Richardson with the inked fingerprints taken from petitioner after his arrest, it was his opinion that the latent fingerprint was the same as the impression on the inked prints of petitioner's left ring finger. [JA, p. 76]. On cross-examination, Evan's acknowledged that there is no way to determine how old a latent print might be. [Transcript of Evidence, Vol. III, p. 82]. Prints on the inside of buildings (i.e., not exposed to atmospheric conditions) can last several years. [*Id*].

The next witness was Mr. Edward Taylor, a forensic serologist with the State Crime Laboratory in Frankfort. Taylor testified that he examined Ms. Richardson's blood sample and found her to be a group A secretor. [JA, p. 77]. Taylor also determined that the two strips of cloth

submitted by Detective Owen were found to contain saliva and group A factors. [*Id*].

On cross-examination, Taylor stated that while the white towel that was recovered from Mr. James' home contained samples of hair, the hair was dissimilar from that of the victim. [T.E. Vol. IV, p. 12]. In fact, the hair samples which were found on the white towel were similar to the caucasian head hair and pubic hair of Mrs. James, petitioner's wife. [*Id*]. The towel also contained acid phosphatase, which is a constituent of semen. [T.E. Vol. IV, p. 13].

The final witness for the Commonwealth was Mr. David Adams. Adams was an employee of the office in which Donna Richardson was employed. [JA, p. 80]. Adams stated that on May 6, 1981, Ms. Richardson returned from lunch sometime between 4:30 and 5:00 p.m. [*Id*]. Ms. Richardson came into his office crying, nervous and upset. [*Id*]. At that time, Ms. Richardson told him that she had been raped. [JA, p. 81]. He testified that Ms. Richardson told him that she did not report the incident because "[t]hat's the only way I could get away, that he'd let me go if I didn't tell anyone. Otherwise, he'd kill me." [*Id*].

At the close of the Commonwealth's case, petitioner moved for a directed verdict of acquittal, which was overruled. [T.E. Vol. IV, p. 26].

Petitioner's trial counsel then proceeded with his opening statement, the gist of which was to the effect that the alleged crime could not have happened because petitioner's witnesses would have seen the prosecutrix had the crime occurred:

> There will be testimony to the effect that there was a gentleman who is present most of the afternoon dur-

> ing the alleged times that this incident occurred, who had the occasion or the opportunity to observe and see this if it, in fact, did so occur.
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> * * *
>
> This gentleman's testimony will be that he was in this area most of the afternoon, and particularly during the time that the victim was supposed to have left Mr. James' residence, that he could not have missed seeing Ms. Richardson if she did so, in fact, leave Mr. James' home.
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> [Transcript of Evidence, Vol. IV, pp. 28-29].

The first witness for petitioner was Mr. Marion Bates. [JA, p. 85]. Bates testified that he lived at 266 E. Main Street in Frankfort. [*Id*]. On May 6, 1981, he was in his yard working on his car. [JA, p. 86]. Around noon time, Chuck Lambert approached him and asked him to come and see his basement, which he had renovated. [JA, pp. 86-87]. The basement was in the house in which petitioner lived. [*Id*]. Bates testified that he was in the basement at approximately 12:40 p.m., at which time Lambert had to return to work. [JA, p. 88]. Bates returned to his driveway to work on his car. [*Id*]. In the meantime, petitioner had come out of the house, locked the door, and went up the street. [*Id*]. When Bates was in the house, he had heard nothing upstairs but the record player. [*Id*]. During the time that Bates was out front working on his car, he did not see anyone go into or out of petitioner's apartment. [JA, p. 89].

The final witness for petitioner was Charles Lambert. Lambert stated that he did not recall showing his property to Bates on the particular date of May 6, 1981, but that

it was not unusual for him to show Bates his property. [JA, p. 95].

Petitioner did not testify. However, at the close of all the evidence, petitioner requested that an admonition be given to the jury with regard to his failure to testify. The motion was overruled. [JA, p. 95].

In his closing argument, petitioner's trial counsel presented petitioner's defense, in essence, as resting upon reasonable doubt and the presumption of innocence. As to the burglary, trial counsel argued that there was no evidence presented that the petitioner entered Ms. Richardson's home on May 1, 1981, other than a fingerprint which could have been impressed at any time. [JA, p. 96]. As to the rape, trial counsel argued that had it occurred, someone would have seen Donna Richardson entering or leaving petitioner's home:

> No one saw this. He was supposedly doing this at gunpoint, during the lunch hour in Frankfort on a business day. We know what kind of town Frankfort is. We know what kind of town Frankfort is. Frankort is a town that there are a lot of state workers. There is a lot of commotion especially up and down East Main Street. No one saw this.
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> [JA, pp. 97-98].

Petitioner's trial counsel did not attempt to establish a motive for the accusations made by Donna Richardson.

The prosecutor's closing arguments on several occasions infringed upon petitioner's right to not testify. For example, the prosecutor told the jury that:

> Everywhere you look, and this I think is a strong feature of this case, what a young lady told you from the witness stand is validated. *You never found a single time in the evidence where he contradicts one thing that she told you . . .*
>
> * * *

> She said he bound her hands with two pieces of strips of cloth. Isn't it strange that he had a bag on his person a few hours later and had two pieces of cloth in it, not three, not one, not seven. How could she have known that if she hadn't been there and this hadn't taken place. There's no way any one could know that. *That has never been explained except what the record shows as the truthful statements of this victim.*
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> [JA, pp. 106-108 (Emphasis added)].

The prosecutor further enhanced his references to petitioner's failure to explain incriminating evidence by commenting upon the failure of petitioner to present his wife's testimony:

> Now I'm going to make a little statement. How do we know what this defendant's wife's blood type is. There is no way we can know. That is not available to us. She is not charged with a crime I submit to you if her blood type was group A, you would have heard it from this witness stand, but I don't recall that Lisa James came and testified. So why do they want to run you down that trail?[5]
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> [JA, p. 108].

After deliberating, the jury convicted petitioner of second degree burglary, and fixed his sentence at ten (10) years imprisonment. [Transcript of Record, p. 37]. Petitioner was also convicted of rape, and sentenced to twenty (20) years imprisonment. [*Id*]. Finally, the jury con-

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[5] Prosecutorial comment upon the failure of a defendant to call a spouse to testify for the defense has been held to violate Kentucky statute, and constitutes reversible error. KRS 421.210(1); *Gossett* v. *Commonwealth*, Ky., 402 S.W.2d 857 (1966). Petitioner acknowledges that any error in this regard is arguably not cognizable as federal constitutional error. However, petitioner submits that the prosecutor's comments in this regard magnify both the comments upon his own failure to testify and testimony of police officers to the effect that petitioner failed to explain incriminating evidence.

victed petitioner of receiving stolen property, and fixed his punishment at twelve (12) months incarceration. [Transcript of Record, p. 38].

After petitioner's conviction on the principal offenses, the trial continued with the persistent felony offender (PFO) proceedings. The jury convicted petitioner as a first degree PFO, and fixed his punishment at life in the penitentiary. [JA, pp. 8-9].

On appeal, the Kentucky Supreme Court affirmed petitioner's conviction. *James* v. *Commonwealth*, Ky., 647 S.W.2d 794 (1983). [JA, pp. 112-115]. In disposing of petitioner's argument that he was entitled to judicial guidance with regard to his Fifth Amendment privilege, the Court held that:

> James requested that the trial court give an "admonition" to the jury that no emphasis be given to James' failure to testify. This request was denied by the trial court. In his arguments on this appeal James attempts to equate this request for an admonition with a request for an "instruction" on failure of the defendant to testify. *Carter* v. *Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), held that a state trial judge has the constitutional obligation to give a prophylactic instruction upon proper request to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify. *There is a vast difference in a request for an admonition and a requested instruction. James was entitled to the instruction, but did not ask for it. The trial court properly denied the request for an admonition.* [JA, p. 114 (Emphasis added)].

Subsequently, this Court granted James' petition for writ of certiorari to the Supreme Court of Kentucky.

SUMMARY OF ARGUMENT

At petitioner's criminal trial, the trial judge refused petitioner's request to admonish the jury in regard to petitioner's failure to testify. On appeal, the Supreme Court of Kentucky affirmed, holding that petitioner's request for an admonition was not equivalent to a request for the instruction mandated by this Court in *Carter* v. *Kentucky*, 450 U.S. 288 (1981).

Petitioner's claim herein is based upon the explicit guarantee contained in the Fifth Amendment to the federal Constitution which prohibits compelled self-incrimination. That right is made applicable to the states through the due process clause of the Fourteenth Amendment. Decisions of this Court have elucidated the principle that the Fifth Amendment is implicated when a criminal defendant suffers a penalty as a result of his failure to testify. Thus, not only has adverse comment on a defendant's failure to testify been prohibited, but further, judicial guidance as to jurors' understanding of the privilege has been mandated.

Because the trial judge has the unique power to reduce jury speculation as to a defendant's failure to testify, the trial court must avail itself of that power upon the defendant's timely request. In this case, petitioner's request for an admonition was the functional equivalent of an instruction. Either form of judicial guidance accomplishes the intended purpose of serving as a prophylactic measure in protecting and furthering the Fifth Amendment privilege.

In this case, the denial of the requested admonition was not "harmless error," and the Kentucky Supreme Court did not so hold, although given the opportunity. Petitioner presented evidence at trial which tended to raise a reasonable doubt that petitioner was even present at his

home at the time of the alleged rape of which he was convicted. Petitioner's failure to testify and explain his whereabouts was obviously the result of his fear of impeachment by introduction of evidence of a prior felony conviction. In these circumstances, the denial of judicial guidance as to petitioner's failure to testify cannot be characterized as harmless beyond a reasonable doubt.

ARGUMENT

THE OPINION OF THE SUPREME COURT OF KENTUCKY REPRESENTS AN OBVIOUS ATTEMPT BY THAT COURT TO CIRCUMVENT THE MANDATE OF THIS COURT IN *CARTER* V. *KENTUCKY* AND DEPRIVES PETITIONER OF THE BENEFIT OF JUDICIAL GUIDANCE AS TO THE JURORS' UNDERSTANDING OF THE PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION.

Petitioner, by his counsel, requested prior to the instruction of the jury that "an admonition be given to the jury that no emphasis be given to the [petitioner's] failure to testify . . ." [JA, p. 95]. Petitioner submits that the failure of the trial court to do so deprived him of due process of law.

A. Petitioner Was Entitled To Judicial Guidance As To The Jurors' Understanding Of The Fifth Amendment Privilege.

The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Petitioner did not testify at his trial. Nonetheless, petitioner submits that the refusal of the trial court to guide the jury as to the nature of his privilege invokes that which the Fifth Amendment prohibits because it penalizes a defendant for *not* testifying. Or, as this Court stated in *Griffin* v. *California*, 380 U.S. 609, 614 (1965): "it cuts down on the privilege by making its assertion costly." Until recently, the law in Kentucky had

been to the effect that *no* comment (even one protective in nature) could be made on a defendant's failure to testify. *Green* v. *Commonwealth*, Ky., 488 S.W.2d 339 (1972), interpreting KRS 421.225; but see *Spencer* v. *Commonwealth*, Ky., 467 S.W.2d 128 at 130-131 (1971) and *Kelley* v. *Commonwealth*, 300 Ky. 136, 187 S.W.2d 796, 800 (1945) (holding that the defendant was entitled to an instruction upon request; the language in *Spencer* was rejected in *Green*, *supra*, as "dicta").

Notwithstanding Kentucky common law, petitioner submits that the requested "admonition" in this case is now constitutionally mandated. That petitioner's trial counsel requested an "admonition" rather than an instruction is of no legal significance, at least in the context of deciding the scope of petitioner's Fifth Amendment privilege. Whatever form of judicial guidance is requested, the constitutional underpinnings are the same. The only significant legal concern is that the jury understand a criminal defendant's privilege against self-incrimination. An admonition, which has been defined in Kentucky as "any authoritative oral communication or statement by way of advice or caution by the court to the jury respecting their duty or conduct as jurors . . .," *Miller* v. *Noell*, 193 Ky. 659, 237 S.W. 373, 374 (1922), is *functionally* equivalent to an instruction.

In *Carter* v. *Kentucky*, 450 U.S. 288 (1981), this Court reviewed a decision of the Supreme Court of Kentucky which affirmed Carter's conviction despite the refusal of the trial court to instruct the jury on Carter's failure to testify. This Court reversed, stating that:

> The freedom of a defendant in a criminal trial to remain silent 'unless he chooses to speak in the unfettered exercise of his own free will' is guaranteed by the Fifth Amendment and made applicable to state

> criminal proceedings through the Fourteenth. [Cite omitted]. And the Constitution further guarantees that no adverse inferences are to be drawn from the exercise of that privilege. [Cite omitted]. Just as adverse comment on a defendant's silence "cuts down on the privilege by making its assertion costly," [cite omitted], the failure to limit the jurors' speculation on the meaning of that silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege. *Accordingly, we hold that a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify.*
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> [*Id*, 450 U.S. at 305 (Emphasis added)].

It cannot be assumed that the jury in petitioner's case did not notice petitioner's failure to testify, and therefore drew no adverse inference therefrom. This Court has labeled such an assumption as "very doubtful . . . speculative . . . [and] dubious . . ." *Lakeside* v. *Oregon*, 435 U.S. 333 (1978). In *Lakeside*, a "no adverse inference" instruction was given over the defendant's objection. Lakeside maintained that in certain circumstances, a defendant can reasonably hope that the jury will not notice that he did not testify. [*Id*, at 339]. This Court responded that:

> . . . petitioner's argument would require indulgence in two very doubtful assumptions: First, that the jurors have not noticed that the defendant did not testify and will not, therefore, draw adverse inferences on their own; second, that the jurors will totally disregard the instruction, and affirmatively give weight to what they have been told not to consider at all. Federal constitutional law cannot rest on speculative assumptions so dubious as these.
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> [*Id*, at 340].

In a footnote in *Lakeside*, the Court noted that an adverse inference from silence "may be inevitable." Quoting Wigmore, the Court stated that: "What inference does a plea of privilege support? The layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime." [*Id*, at 340, fn. 10, citing 8 J. Wigmore, Evidence § 2272, p. 426 (McNaughton rev. 1961)].

As to the jurors' ability to follow the guidance of trial judges, this Court remarked in *Lakeside* that: "[W]e have not yet attained that certitude about the human mind which would justify us in . . . a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court. . . ." [*Id*, at 340, citing *Bruno* v. *United States*, 308 U.S. 287, 294 (1939)].

In this case, the record clearly supports the inference that petitioner's election to refrain from testifying was based upon the prospects of his impeachment with a previous felony conviction. Regardless of the advisability of such a trial tactic in that particular circumstance, this Court fashioned a rule in *Carter* that would require instruction on the defendant's failure to testify without consideration of the reason for the refusal to testify. As this Court noted in *Carter*, "[t]he inclusion of the privilege against compulsory self-incrimination in the Fifth Amendment 'reflects . . . how our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.' " *Carter*, 450 U.S. at 299-300, citing *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964). The rule is well taken. Many defendants may have reasons for declining to testify unrelated to guilt or innocence. This fact has already been recognized in the decisions of this Court. For example, in *Griffin* v. *California*, *supra*, this Court stated that:

> It is not every one who can safely venture on the witness stand, though entirely innocent of the charge

> against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would therefore willingly be placed on the witness stand. [*Id*, 380 U.S. at 613, citing *Wilson* v. *United States*, 149 U.S. 60, 66 (1892)].

As in this case, a defendant might decline to testify as a result of fear of impeachment by prior felony convictions. See *Griffin*, 380 U.S. at 615. Additionally, the defendant might be reluctant to testify out of hesitancy to "incriminate others whom they either love or fear." *Lakeside* v. *Oregon*, 435 U.S. at 344, fn. 2. As Mr. Justice Stevens stated in his dissent in *Lakeside:*

> Every trial lawyer knows that some truthful denials of guilt may be considered incredible by a jury—either because of their inherent improbability or because their explanation, under cross-examination, will reveal unfavorable facts about the witness or his associates. [*Lakeside* v. *Oregon*, 435 U.S. at 343].

The case at bar illustrates the danger in failing to guide the jury as to the Fifth Amendment privilege. If this Court was correct in stating that the average person would infer guilt from silence, then the jury in petitioner's case erroneously made that inference. As noted, *supra*, the clear implication from the record is that petitioner failed to testify due to the stated intention of the prosecutor to impeach him with a prior felony conviction. Therefore, petitioner's decision not to testify was a result of matters unrelated to guilt or innocence. Consequently, the need for a prophylactic instruction was particularly appropriate at petitioner's trial.

In explaining the rationale of *Carter* in requiring a prophylactic instruction, the Court stated:

> The *Griffin* case stands for the proposition that a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify. The penalty was exacted in *Griffin* by adverse comment on the defendant's silence; the penalty may be just as severe when there is no adverse comment, but when the jury is left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt. Even without adverse comment, the members of a jury, unless instructed otherwise, may well draw adverse inferences from a defendant's silence. [*Carter*, 450 U.S. at 301.]

Judicial guidance in the form of some type of charge to the jury is "perhaps nowhere more important than in the context of the Fifth Amendment privilege against compulsory self-incrimination, since '[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are . . . guilty of crime. . . .' [*Id*, at 302, citing *Ullman* v. *United States*, 350 U.S. 422, 426 (1955)].

It is obvious that this Court's decision in *Carter* did not turn on the *form* of the guidance which this Court directed trial judges to give juries as to the privilege against self-incrimination. In *Bruno* v. *United States*, 308 U.S. 287 (1939), this Court, in interpreting a federal statute, stated that:

> The only way Congress could provide that abstention from testifying should not tell against an accused was by an implied direction to judges to exercise their judicial duty in guiding the jury by indicating the considerations relevant to the latter's verdict on the facts. [*Bruno*, *supra*, 308 U.S. at 293].

For juries to function effectively, they must be accurately instructed in the law. As this Court has noted, judicial guidance is particularly critical when a defendant exercises his privilege against self-incrimination. An admonition would be at least *minimally* adequate to ensure that this Court's concerns about jurors' attitudes with regard to the privilege would be heeded.[6]

The opinions of this Court evidence the Court's belief that jurors will understand and follow a judge's instructions on the law. *Lakeside, supra; Carter, supra.* As this Court stated in *Starr* v. *United States*, 153 U.S. 614, 626 (1893), "[i]t is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." Or, as Mr. Justice Frankfurter wrote for the Court in *Bollenbach* v. *United States*, 326 U.S. 607, 612 (1945), "[d]ischarge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance a lucid statement of the relevant legal criteria."

A judge's responsibility to guide the jury takes the form of both admonitions and instructions. In Kentucky, the courts have acknowledged the importance of timely admonitions to the jury as to a broad range of trial circumstances. For example, trial courts either upon request or *sua sponte*, will orally charge a jury regarding testimony

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[6] As noted in *Carter*, "[t]he importance of a no-inference instruction is underscored by a recent national public opinion survey conducted for the National Center for State Court, revealing that 37% of those interviewed believed that it is the responsibility of the accused to prove his innocence. *Carter*, 450 U.S. at 303, fn. 21, citing 64 A.B.A.J. 653 (1978).

as to reputation for untruthfulness; evidence tending to show motive; evidence of other crimes; evidence of flight; and, bias of a witness.[7]

This Court surely could not have meant in its opinion in *Carter* v. *Kentucky* that a state trial court could *only* exercise its judicial duty to guide a jury by way of a *written* instruction. The Court's implicit concern was the psychological operation of the jury's mind, and petitioner submits that a judge can certainly indicate the considerations relevant to the jury's deliberation by oral admonition as well as by written instruction.

B. Kentucky Has No Legitimate State Interest In Barring Petitioner's Claim Due To The Form Of Jury Guidance He Requested.

The Supreme Court of Kentucky rejected petitioner's claim that he was entitled to an admonition on his failure to testify, holding that "[t]here is a vast difference in a request for an admonition and a requested instruction. James was entitled to the instruction, but did not ask for it. The trial court properly denied the request for an admonition." [JA, p. 114]. In other words, the Supreme Court of Kentucky applied a procedural bar to the relief requested due to the manner and form in which the relief was requested. It is significant that the Supreme Court of Kentucky noted that had petitioner requested an "instruction," rather than an "admonition," he would have been entitled to the relief requested. [*Id*]. Petitioner

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[7] In order to demonstrate a representative range of admonitions given to juries in Kentucky during the course of a trial, petitioner has collected pattern admonitions contained in the leading text on instructions to juries in Kentucky. *Instructions To Juries In Kentucky*, Chapter 12, "Admonitions To The Jury," John S. Palmore and Robert G. Lawson (Vol. 1, Criminal) has been included as an Appendix to the Brief for Petitioner.

submits that Kentucky has no substantial state interest in applying the procedural bar as it did in this case. In fact, petitioner would suggest that Kentucky has *no* state interest whatsoever in such a bar. Petitioner acknowledges that he has a duty to comply with rules of criminal procedure which serve a legitimate state interest. The decisions of this Court have upheld the legitimate state interest in "contemporaneous objection" rules. *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). However, there are no valid policy concerns expressed in *Wainwright* v. *Sykes*, which have application to the case at bar. In fact, petitioner *did* sufficiently comply with Kentucky's criminal rules. Kentucky Rule of Criminal Procedure 9.54(2) provides that:

> No party may assign as error the giving or failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction *or by motion, or unless he makes objection before the Court instructs the jury*, stating specifically the matter to which he objects and the ground or grounds of his objection. (Emphasis Added).

Petitioner's request for an admonition "fairly and adequately presented his position . . . by motion," and his objection to the trial court's refusal to admonish the jury fairly and adequately apprised the trial court of the relief which he was requiring. Significantly, at the time of petitioner's trial, trial judges were required by Kentucky's own Rules of Criminal Procedure to provide guidance on the failure to testify:

> The instructions shall not make any reference to a defendant's failure to testify unless so requested by him, in which event the court shall give an instruction to the effect that he is not compelled to testify and that the jury shall not draw any inference of guilt

> from his election not to testify and shall not allow it to prejudice him in any way.
>
> [Ky. Rev. Stat., R. Crim. Proc. 9.54(3) (effective September 1, 1981)].

Obviously, the trial court had notice of the requirement to instruct the jury upon request when the defendant elected not to testify. The trial court's failure to do so cannot be excused due to a technical distinction turning upon the defendant's request for judicial guidance in oral form rather than written form. The trial court could easily have granted the substance of petitioner's request by merely submitting a written instruction in conformity with his obligation. The circumstances of petitioner's case parallel circumstances at issue before this Court in *Henry* v. *Mississippi*, 379 U.S. 443 (1965). In *Henry*, the defendant's trial counsel failed to strictly comply with a Mississippi procedural requirement that an objection to illegal evidence be made at the time such evidence is introduced. Rather, Henry's trial counsel moved for a directed verdict at the close of the prosecution's case, assigning as one ground the use of allegedly illegally obtained evidence. This Court observed that "[t]he Mississippi rule requiring contemporaneous objection to the introduction of illegal evidence clearly does serve a state interests" because "[b]y immediately apprising the trial judge of the objection, counsel gives the Court the opportunity to conduct the trial without using the tainted evidence." [*Id*, 379 U.S. at 448]. Despite the trial attorney's apparent failure to scrupulously adhere to Mississippi's procedural requirements, this Court recognized that "this purpose of the contemporaneous objection rule may have been substantially served by [the defendant's] motion at the close of the State's evidence asking for a directed verdict because of the erroneous admission of the officer's testimony." [*Id*]. "For at this stage [the close of the prosecution's case in chief] the trial judge could have called for

elaboration of the search and seizure argument and, if persuaded, could have stricken the tainted testimony to go to the jury, the motion for a directed verdict might have been denied, and the case submitted to the jury with a properly worded appropriate cautionary instruction." Based upon this analysis, this Court concluded that "[i]n these circumstances, the delay until the close of the State's case in presenting the objection cannot be said to have frustrated the State's interest in avoiding delay and waste of time in the disposition of the case." [*Id.* at 448-449].

Likewise, petitioner's request for an admonition cannot be said to have frustrated Kentucky's interest in requiring objections to, or requests for, specific instructions prior to the instructing of the jury. Petitioner's request cannot be characterized as "sandbagging." The requested admonition would certainly have served petitioner's interest in having the jury decide the case only upon the evidence presented, without speculation as to his reasons for not testifying. There is no requirement in either Kentucky or the federal courts that a request for relief or an objection to procedure be phrased in the most precise manner possible. There is only a requirement that trial counsel call alleged errors to the attention of a trial court in a timely fashion, and to fairly and adequately inform the trial court of the relief which is being requested. There is no doubt in this case that petitioner's request was both timely and constitutionally adequate. Accordingly, the Kentucky Supreme Court's affirmance of the refusal to grant petitioner the relief he requested due only to his choice of the *form* of judicial guidance he requested is misconceived and represents an antiquated adherence to form over substance. Because the Kentucky Supreme Court's application of the procedural bar in this case has no foundation and serves no legitimate state

interest, this Court need not honor that bar. See *Engle* v. *Walker*, 703 F.2d 959 (CA6, 1983). "[G]iving effect to the contemporaneous-objection rule for its own sake 'would be to force resort to an arid ritual of meaningless form.' " *Henry* v. *Mississippi*, *supra*, 379 U.S. at 449. Because the refusal of the Kentucky Supreme Court to grant petitioner relief conflicts with this Court's decision in *Henry* v. *Mississippi*, this Court may address the merits of petitioner's claim.

C. The Trial Court's Failure To Admonish The Jury Regarding Petitioner's Failure To Testify Was Not Harmless Error.

(i) Refusal of a trial court to guide the jury in some manner regarding the defendant's failure to testify is never harmless error.

In its response to the petition for writ of certiorari herein, respondent argued that, "[s]hould this Court decide that the state decision does not rest upon an adequate state ground, then the cause should be remanded to the Kentucky Supreme Court for further consideration . . . to decide whether the failure to give an instruction is non-prejudicial error in this case pursuant to *Chapman* v. *California*, 386 U.S. 18 (1967)." Brief for Respondent in Opposition to Petition for Writ of Certiorari, pp. 13-14. Petitioner submits that the error complained of herein should not be susceptible to analysis under the "harmless error" doctrine. The instruction considered by this Court in *Carter* was first considered by the Court in *Bruno* v. *United States*, 308 U.S. 287 (1939). As a question of federal *statutory* law, a unanimous Court in *Bruno* decided that a federal criminal defendant was entitled upon request to a "no adverse inference" instruction. The Court in *Bruno* specifically refused to apply 28 U.S.C.

§ 391 (1928)*, the federal "harmless error" rule. This Court noted in *Bruno* that the harmless error rule was designed to eliminate reversal based upon "mere etiquette of trials and the formalities in minutiae of procedure. . . ." 308 U.S. at 294. "*Of a very different order of importance is the right of an accused to insist on . . . [the "no inference" instruction].*" [*Id.* (Emphasis Added)]. *Bruno* then, stands for the proposition that, as a matter of federal statutory procedure, refusal to give the instruction cannot be harmless error.

Of course, *Carter* constitutionalized the requirement first announced in *Bruno* that a criminal defendant was entitled to a "no inference" instruction upon request. In analyzing harmless error in the context of the denial of constitutional rights, this Court has placed a burden upon the prosecution to demonstrate that the error is harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967). Because this more stringent harmless error analysis applies to constitutional violations, and since refusal of a "no inference" instruction is not harmless under federal statutory procedure, it necessarily follows that the same error cannot be held harmless under a constitutional analysis.

Admittedly, *Chapman* held that prosecutorial comment on the defendant's failure to testify, in violation of *Griffin* v. *California*, might constitute error which would be harmless. Nonetheless, there are sound policy reasons why *Chapman* should not be applied to *Carter* errors although it is applied to *Griffin* errors. *Griffin* errors are committed by the prosecutor, *not* the court. Criminal defendants and defense attorneys cannot predict the

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* The statute required disregarding "technical errors . . . which do not affect the substantial rights of the parties." The federal harmless error rule is now codified as 28 U.S.C. § 2111 (1959).

occurrence of prosecutorial comment on the defendant's failure to testify. In the event that the prosecutor elects to inject constitutional error by commenting on the defendant's failure to testify, a trial court is placed in a position of having to determine whether or not it can cure such error by an admonition, assuming there is timely request, or whether or not the error requires a mistrial. The curative admonition would in effect be a substitute (albeit, a minimally adequate one) for the jury guidance mandated under *Carter*.

Unlike the speculative nature of predictions as to what the prosecutor may or may not do in closing argument, criminal defendants and defense attorneys should be able to rely upon trial court's fulfilling their constitutional obligations. It is universally recognized that "the accused has the ultimate authority to make certain fundamental decisions regarding the case," including the decision whether or not to testify in his own behalf. *Jones* v. *Barnes*, ___ U.S. ___, 103 S.Ct. 3308 (1983). The decision of a criminal defendant is entitled to "the guiding hand of counsel" in making this critical choice as to whether or not to testify. *Brooks* v. *Tennessee*, 406 U.S. 603 (1972). While counsel cannot "guide" a defendant's decision by informing him as to whether or not he will be penalized by prosecutorial misconduct in comment upon his failure to testify, counsel *should* be able to inform a defendant who might elect not to testify that the trial court will in fact provide some guidance to the jury regarding the nature of the Fifth Amendent privilege. In *Carter*, this Court left the decision as to whether or not the trial court would provide jury guidance on the privilege *to defense counsel*.

It would be extremely unfair to allow "harmless error" analysis of refusals to give "no inference" instructions (or

admonitions) because the analysis is by necessity limited to a review of the *record*. The decision-making process by which defense counsel and the defendant come to the conclusion that jury guidance is uncalled for will not appear on the record. Consequently, if the defense attorney and defendant arrive at a decision that the defendant will not testify, in reliance upon the anticipated judicial guidance on the Fifth Amendment privilege, and such is not forthcoming, the trial court has then not only infringed the Fifth Amendment privilege, but invaded the defendant's Sixth Amendment right to counsel. This sort of judicial invasion of the Sixth Amendment right should never be countenanced as harmless error. See *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

Chapman does not stand for the proposition that harmless error analysis is a constitutional imperative. "Chapman stands only for the proposition that certain constitutional guarantees do not *themselves* require reversal for harmless violations. If there is *other* authority, aside from the constitutional provisions violated in the case, that supports either a decision not to apply the rule or to reverse a conviction even though the error at issue is harmless, *Chapman* does not stand as a bar to such action. *United States* v. *Hasting*, ___ U.S. ___, 103 S.Ct. 1974, 1989 (1983) (Brennan, concurring in part and dissenting in part) (Emphasis in original). In the case at bar, the importance of criminal defendants being able to make *reasoned* decisions as to whether or not to testify, after consultation with counsel, supports a *per se* rule requiring *Carter*-type instructions or admonitions upon request.

(ii) The trial court's refusal of the requested admonition at petitioner's trial was not harmless beyond a reasonable doubt.

The evidence in this case was not "overwhelming," such that any constitutional error was "harmless beyond a reasonable doubt." While much of the evidence was "uncontradicted," that circumstance is going to occur very often when a defendant exercises his right not to testify. The fact that the jury might infer guilt from silence, when in fact the decision not to testify is unrelated to guilt or innocence, is the precise reason for judicial guidance on the privilege. In any event, the evidence in this case does not necessarily exclude every reasonable doubt. For example, there was evidence that petitioner disclaimed ownership of the bag which contained both the pistol stolen from the prosecutrix and strips of cloth allegedly used to gag the prosecutrix. [JA, p. 75]. Evidence of a fingerprint alleged to be that of petitioner was critical to the Commonwealth's case regarding the burglary. However, there was testimony from the prosecutrix that petitioner had been in her home on previous occasions. [JA, pp. 42-43]. And, the Commonwealth's own expert admitted that fingerprints can last "several years." [Transcript of Evidence, Vol. III, p. 82]. There was no evidence that the fingerprint in question was impressed at the time of the burglary. Fingerprint evidence *alone* is insufficient to convict, absent proof of circumstances that the fingerprints could *only* have been impressed at the time the crime was committed. See *Borum* v. *United States*, 380 F.2d 595 (CADC, 1967); *Hiet* v. *United States*, 365 F.2d 504 (CADC, 1966); *United States* v. *Collon*, 426 F.2d 939 (CA6, 1970). As to evidence of the rape, petitioner presented evidence that, had he been at the crime scene at the time the alleged crime was being perpetrated, he would have been seen. In other

words, defendant had *some* evidence that he was not even there.

The evidence that the Commonwealth presented created the situation where the logical person to testify to facts which would contradict the Commonwealth's evidence would be petitioner himself. The danger that petitioner's silence would be equated with guilt is the precise danger this Court sought to avoid in *Carter*. There is ample support in the record that petitioner's election not to testify was based upon his fear of impeachment with a prior felony conviction. In other words, petitioner's exercise of his right not to testify was based upon reasons unrelated to guilt or innocence. It simply cannot be said that the refusal of the trial court to provide some guidance to the jury by way of admonition regarding petitioner's failure to testify was "harmless beyond a reasonable doubt."

It is important to note that the Supreme Court of Kentucky did *not* decide this case on the basis of harmless error. Rather, the Supreme Court of Kentucky's disposition of this issue was decided *entirely* on the terminology of petitioner's request:

> James requested that the trial court give an "admonition" to the jury that no emphasis be given to James' failure to testify. This request was denied by the trial court. In his argument on this appeal James attempts to equate this request for an admonition with a request for an "instruction" on failure of the defendant to testify.
>
> * * *
>
> There is a vast difference in a request for an admonition and a requested instruction. James was entitled to the instruction, but did not ask for it. The trial court properly denied the request for an admonition. [A., p. 3].

Had the Kentucky court chosen to decide this case on "harmless error," it could have done so. Only two weeks prior to the opinion of the Kentucky Supreme Court in petitioner's case, the Court decided *Commonwealth* v. *McIntosh*, Ky., 646 S.W.2d. 43 (February 16, 1983). In *McIntosh*, the Kentucky Supreme Court stated that:

> . . . *Carter* leaves open the question of whether under certain circumstances the failure to give the requested instruction could be nonprejudicial error pursuant to the standards set in *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).
>
> * * *
>
> Here proof of guilt was overwhelming. . . . Careful examination of the record does not indicate that any different result would have been achieved in this case.
>
> It is the holding of this court that the failure to give a requested instruction on the effect of the defendant's refusal to testify can be nonprejudicial error if there is overwhelming evidence of guilt and the result would not have been any different when the case is considered as a whole.

Obviously, the Kentucky Supreme Court would have applied the doctrine of harmless error, had it thought that the error in petitioners case was in fact harmless. Because the error was not in fact harmless beyond a reasonable doubt, this Court should reverse his conviction, and grant him a new trial.

CONCLUSION

Petitioner's case presents an opportunity for this Court to reaffirm the clear mandate of *Carter* v. *Kentucky*, and further, provides an opportunity to prevent state appellate courts from distorting the clear import of the decisions of this Court. Because the decision of the Supreme Court of Kentucky in this case conflicts with the rationale of *Carter* v. *Kentucky*, this Court should reverse petitioner's conviction and grant him a new trial.

Respectfully submitted,

C. THOMAS HECTUS
GITTLEMAN & BARBER
635 West Main Street
Louisville, Kentucky 40202
(502) 585-2100
COUNSEL FOR PETITIONER

APPENDIX TO BRIEF FOR PETITIONER

INSTRUCTIONS TO JURIES IN KENTUCKY
BY
JOHN S. PALMORE
JUDGE OF THE COURT OF APPEALS OF KENTUCKY
and
ROBERT G. LAWSON

(VOLUME ONE, CRIMINAL)

CHAPTER 12. "ADMONITIONS TO THE JURY"

* * *

Sec. 12.04 Exclusion of Testimony.

The testimony relating what the witness was told by Mrs. Martin is not competent evidence in this case, and you are admonished to disregard it entirely and put it out of your minds, remembering your oath to try the case according to the evidence.

References: Bess v. Com., 116 Ky. 929, 25 KLR 1091, 77 S.W. 349, 352-353 (1903).

* * *

Sec. 12.12 Impeachment of Witness—Previous Felony Conviction.

(Example 1)

The fact that the defendant has been previously convicted of a felony is not to be considered by you to any degree whatever as evidence of his guilt in this case, but only insofar as it may have a bearing, if it does so, upon his truthfulness as a witness and the weight to be given to his testimony.

References: CR 43.07; RCr 13.04; House v. Com., Ky. 466 S.W.(2d) 949, 951 (1971). See also Cotton v. Com., Ky., 454 S.W.(2d) 698, 700-702 (1970).

(Example 2)

The fact that the witness has been convicted of a felony may not be considered by you for any purpose in this case except

insofar as it may have a bearing, if it does so, upon his truthfulness as a witness and the weight to be given to his testimony.

References: CR 43.07; RCr 13.04; Kelly v. Com., 259 Ky. 770, 83 S.W.(2d) 489, 490 (1935). See also Cole v. Com., 260 Ky. 758, 86 S.W.(2d) 984 (1935) [impeachment with respect to dying declaration].

* * *

Sec. 12.14 Impeachment of Witness—Reputation for Untruthfulness.

(Example 1)

The testimony concerning the defendant's reputation [for untruthfulness] is not to be considered by you to any degree whatever as evidence of his guilt in this case, but only insofar as it may have a bearing, if it does so, upon his truthfulness as a witness, and the weight to be given his testimony.

(Example 2)

The testimony concerning the reputation of the witness [for untruthfulness] is not to be considered by you for any purpose in this case except insofar as it may have a bearing, if it does so, upon his truthfulness as a witness and the weight to be given his testimony.

References: See References and Comment following. Sec. 12.12.

Sec. 12.16 Impeachment of Witness—Inconsistent Statements.

If the witness Johnny Applejack was heard to make a statement at another time and place which contradicts or is inconsistent with his testimony during this trial, that statement made out of court (if he did make it) is not to be considered by you to any degree whatever as evidence of the defendant's guilt or innocence, but only insofar as it may have a bearing, if it does so, upon the truthfulness of the witness's testimony.

References: CR 43.07, RCr 13.04; Lynch v. Com., Ky., 472 S.W.(2d) 263 (1971).

* * *

Sec. 12.26 Other Crimes—Motive of Defendant.

You shall not consider the evidence concerning the burning of the house, the removal of its contents, and the collection of the insurance money for any purpose except insofar as it may tend to show, if it does so, a motive on the part of the defendant to commit the offense for which he is being tried in this case.

References: Bess v. Com., 116 Ky. 927, 25 KLR 1091, 77 S.W. 349, 353-354 (1903) [Murder—Collaboration of deceased and defendant in burning house and subsequent collection of insurance proceeds by defendant].

Sec. 12.28. Other Crimes—Showing Knowledge or Identity.

The testimony you have just heard with reference to the defendant's possession of property that may have been stolen by someone at a different time and place and from other premises than those involved in this proceeding is not evidence of his guilt, and is not to be considered by you in any respect whatever except insofar as it may tend to show, if it does so, the defendant's identity with or knowledge of the offense for which he is being tried in this case:

References: Acree v. Com., 243 Ky. 216, 47 S.W.(2d) 1051, 1054 (1932) [Conspiracy to break into storehouse—Possession of property stolen from other premises]; Richardson v. Com., 166 Ky. 570, 179 S.W. 458, 461-462 (1915) [Breaking into depot—Possession of property stolen from other premises].

* * *

Sec. 12.32 Other Crimes—Showing Plan or System.

The testimony concerning the defendant's conduct upon occasions other than the transaction out of which this case arises may be considered by you only insofar as it may tend to show, if it does so, a plan or system on the defendant's part.

References: Lee v. Com., Ky., 242 S.W.(2d) 984, 987 (1951) [Obtaining money by false pretenses—previous similar conduct].

Sec. 12.42 Threats against Defendant—Showing Motive or Intent.

The testimony by this witness concerning threats made by the decedent with respect to the defendant may not be considered by you to any extent whatever except insofar as it may tend to show motive or intent on his part, if it does so, to commit the alleged offense for which he is being tried.

References: McQueen v. Com., 196 Ky. 227, 244 S.W. 681, 683 (1922) [Homicide—Threat by victim to have defendant arrested, of which defendant had knowledge].

* * *

Sec. 12.50 Flight—Attempt to Evade Arrest—Showing Intent, Motive or Knowledge.

The testimony concerning the alleged break-in at Toohey's garage and the events immediately following may be considered by you only insofar as it may tend to show, if it does so, that the deceased officer had reasonable grounds for believing that a felony had been committed, that the defendant was one of the guilty parties, and that the deceased had the right to arrest him, and insofar as it may tend to show, if it does so, a motive or intent on the part of the defendant with respect to the alleged offense for which he is being tried in this case.

References: Patton v. Com., 289 Ky. 627, 159 S.W.(2d) 1006, 1011 (1942) [Homicide—Events preceding shooting of peace officer].

* * *

Sec. 12.80 Bias of Witness.

The testimony that on an occasion previous to the indictment in this case the defendant had caused the witness Allen to be arrested may not be considered by you for any purpose whatever except insofar as it may tend to show bias on the part of the witness and bear upon the truthfulness of his testimony in this proceeding, if it does so.

References: Richardson v. Com., 201 Ky. 395, 257 S.W. 8, 9 (1923).

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No. 82-6840

IN THE

Supreme Court Of The United States

October Term, 1983

MICHAEL P. JAMES, - - - - Petitioner,

versus

COMMONWEALTH OF KENTUCKY - Respondent.

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR RESPONDENT

DAVID L. ARMSTRONG
Attorney General

PENNY R. WARREN
Assistant Attorney General

ROBERT L. CHENOWETH
Assistant Deputy Attorney General
121 Capitol Building
Frankfort, Kentucky 40601-3494
Telephone: (502) 564-7600
Counsel for Respondent

Petition for Certiorari Filed May 27, 1983
Certiorari Granted October 17, 1983

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED

Whether the Supreme Court of Kentucky Correctly Concluded That, While a No Inference Instruction Is Required To Be Given When Requested, Pursuant to *Carter* v. *Kentucky*, the Privilege Against Compulsory Self-Incrimination Does Not Mandate the Granting of an Unexplained Alternative Defense Request in the Form of an Admonition to the Jury Where Such a Request Conflicts With Established State Practice and Procedure.

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IN THE

Supreme Court Of The United States

October Term, 1983

No. 82-6840

MICHAEL P. JAMES, - - - - *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY, - - *Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT

OPINION BELOW

Respondent respectfully corrects petitioner's statement that the opinion of the Kentucky Supreme Court "is not to be published." The published opinion may be found at: *James* v. *Commonwealth,* 647 S. W. 2d 794 (Ky. 1983).

JURISDICTION

Respondent accepts petitioner's statement of the jurisdictional facts.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner seeks relief before this Court under the Fifth and Fourteenth Amendments to the United States Constitution and accurately sets forth the relevant provisions.

COUNTERSTATEMENT OF THE CASE

On April 23, 1981, the female victim returned to her City of Frankfort, Kentucky, home from a university

night class and found her front porch light unscrewed and her front door, which was always locked, inexplicably ajar (Joint Appendix [hereinafter "JA"] 30-31, 40). Examination of her apartment revealed her bed pillows "messed up" and that the .22 caliber pistol she kept there was missing (JA 30-31). Early the next morning she obtained the serial number of the gun and reported the burglary (JA 30-31, 40). Investigating officers found evidence of possible entry through a front porch window (JA 40). Soon thereafter, Michael James, and his wife, who were next-door neighbors, observed the victim nailing her windows shut and inquired about the incident (JA 42-43).

On May 1, 1981, the victim came home from work and discovered the lower glass panel of her locked kitchen storm door had been removed and a small pane broken out of the back door to gain entry (JA 31-32). Again the pillows of her bed were messed up but nothing apparently taken this time. (*Id.*) She immediately told a neighbor who called the police (JA 32). City of Frankfort Officer Clark found the storm door panel in some bushes beneath the porch (JA 31, 51). One latent print on the inside of the glass panel was subsequently identified as petitioner's by twenty-six positive comparison points (JA 51, 52; 76-77).

On May 6, 1981, the victim came home for lunch and was about to return to work around 12:30 p.m. when petitioner Michael James knocked at the door and asked to call a doctor for his ill wife (JA 32). Although the victim barely knew James, he and his wife had used her phone on a few occasions during the past

several months and she thought nothing of the request (JA 32, 42-43). As she dialed the number, James grabbed her mouth, poked a gun in her side, and threatened to kill her if she did not follow instructions (JA 32). While attempting to push hard to close the front door with his other hand, James accidentally fired his gun and became angry (JA 33). During the subsequent investigation police officers found what appeared to be a .22 caliber bullet on the floor near the door and a slash mark where it apparently hit the wall (JA 59, Transcript of Trial [hereinafter "T"] Vol. III, 46).

James took his victim into the bedroom where he bound her hands with a strip of cloth and gagged her mouth with a similar strip having a knot already tied in it (JA 33). He leaned her across the bed, covered her head with bed linens and then proceeded to walk about the house and search through her purse. (*Id.*) After a time he stood her up, pulled the hood of her sweater over her head and, after checking to make sure no one was watching, took her across a yard to his apartment in a nearby building (JA 33-34). The victim was reminded she would be killed if she tried anything. (*Id.*) After ensuring they were not seen, he took her to the bedroom, ordered her to undress and to climb on the towel he had placed on the bed (JA 34). She testified she was afraid to make any physical resistance to his advances (JA 35, 36). After raping her, James sat on the bed for a long time and would not allow her to dress. (*Id.*) Subsequently, he permitted her to get

dressed but then told her to go in the bathroom and wash (JA 34-35).

James seemed unable to decide what to do with her and sat in the bedroom for a long time and then in the living room where she was told to sit in the middle of the floor. (*Id.*) At one point he mentioned putting her in the attic (JA 35). Throughout the afternoon the victim promised to tell no one and kept suggesting reasons he should let her go before anyone came home (JA 35-36). She also said she could not explain to her father if the second gun he purchased for her was missing from her purse. (*Id.*) Late that afternoon James was finally persuaded to return her purse and gun and let her go (JA 35). Her supervisor, Mr. Adams, testified she returned to work between 4:30 and 5:00 p.m. and was visibly upset (JA 80-81). After calming her down a bit and learning of the incident, Mr. Adams urged her to call the police, but the victim explained petitioner said he would kill her if she told anyone and that reporting the robbery (sic) had not done any good (JA 36, 80-81). Adams continued to urge her to go to the hospital and to report the crime to the state police (JA 81).

She left work and went to a girlfriend's and then to a friend who called the police at approximately 6:00 p.m. (JA 36, 60-61, 71). Following the police interview during which she gave them James' description, his first name (the only name she knew) and approximate address, the victim was taken to the hospital for examination and tests (JA 36, 54, 71-72; T. Vol. I, 28). Subsequent lab analysis revealed semen

on the vaginal swabs, vaginal smear, a tampon, and her panties (JA 79).

Petitioner's last name and exact address were obtained through fire department records of a recent fire and an arrest warrant was obtained (JA 71-72). At his residence, James' wife said he was refereeing a basketball game at Kentucky State University; therefore, four officers proceeded to the University gym where they found an intramural game in progress and recognized James by his height, 6 feet 11 inches (JA 55, 72; T. Vol. I, 28; Vol. III, 53). When the game concluded in a few minutes, James picked up a gym bag from the bleachers and began to leave (JA 55, 72; T. Vol. III, 53). He was stopped at the door and placed under arrest, the gym bag being taken from him at the time (JA 55-56, 72). The bag was placed in the front seat of the police cruiser and James in the back (JA 56, 63). At that time and when questioned later, James repeatedly denied knowledge or ownership of the gym bag and said it was handed to him by someone (JA 75; T. Vol. I, 30; T. Vol. III, 57). He declined to consent to a search of his residence and was transported to headquarters while a search warrant was obtained for his apartment (JA 56-57, 73). During the execution of the search, State Trooper Sparks and Detective Courtney, City of Frankfort Police Department, returned to the cruiser for additional evidence bags (JA 57). Reaching for evidence bags under the gym bag, which remained on the front seat, Trooper Sparks felt what seemed through the canvas of the gym bag to be a gun. (*Id.*) He took the gym

bag inside where it was found to contain the victim's .22 caliber pistol reported stolen on April 23, 1981, and two cloth strips, one with a knot in it (JA 57-58, 74).

Analysis of the cloth strips revealed saliva of a blood Group A secreter in the knot and a blood test disclosed the victim was a Group A secreter (JA 77-78). Petitioner was found to have Group B blood (T. Vol. III, 11). A towel from James' bathroom contained semen, but in all instances the quantities of semen were too limited to determine blood type (JA 78).

James was subsequently indicted for the May 1, 1981, burglary, KRS 511.030, for the May 6, 1981 rape, KRS 510.040, and for a misdemeanor of receiving stolen property arising from his possession of the recently stolen gun, KRS 514.110 (JA 3). He was also charged as a first degree persistent felon, KRS 532.080, based on his 1972 Nebraska forgery conviction for which he received a two-year probated sentence and his 1973 Virginia murder conviction from which he was on active parole (JA 4, 14, 17).

The case was tried by jury January 18, 1982. During a pretrial motion the prosecutor requested and received permission to impeach James based on his 1972 forgery conviction, should James choose to testify (JA 17). The prosecutor acknowledged the murder conviction could not be mentioned until the second stage of the bifurcated proceedings which follow a jury determination of guilt on the primary offenses (*Id.*). The voir dire examination of prospective jurors was conducted by counsel. The prosecutor included in his

inquiry questions as to the prospective jurors' understanding of the presumption of innocence and burden of proof.[1] Defense counsel included in his inquiry questions concerning prior jury experience; relationships to law enforcement personnel; knowledge of the participants in the case; and attitudes concerning sex crimes, womanhood and community crime (JA 19-29). The possible impact of a person's mistake in the past was explored with one juror who responded a single past mistake would not pose a problem or "get in my way." (JA 27). The jurors were again reminded that Mike James is presumed to be innocent and were questioned in greater detail concerning this presumption and the prosecution's burden to prove guilt beyond a reasonable doubt (JA 27-28). The jurors promised to listen to all evidence presented from the witness stand and to give it equal consideration (JA 29). One juror was asked if the defendant's failure to testify would create any inference as to guilt or innocence and he responded "No, sir." Defense counsel continued by asking if the juror could still afford the defendant his presumption of innocence and consider all evidence presented from the witness stand, to which the juror responded affirmatively (JA 29). Upon repetition of this question to the panel at large, the trial judge noted that the jurors said they would try the case solely upon the law and the evidence which excludes other consid-

[1]The venire were asked by the prosecutor: "Do you understand that under the law in this state that the defendant is presumed innocent until proven guilty beyond a reasonable doubt? You understand that's the law? Will you grant to this defendant that presumption if you sit in this case " (JA 18.)

erations (JA 29-30). Defense counsel announced he had concluded his voir dire examination (JA 30). The court then advised the jury as follows:

> "Ladies and gentlemen, let me simply add to what counsel have already said to you. Any defendant in any case is entitled to the presumption of innocence unless and until he is proven guilty beyond a reasonable doubt by credible, believable, competent evidence produced by the Commonwealth. The indictment of the defendant is not to be considered by the jury as evidence of guilt. It is simply an accusation made by the Grand Jury based on evidence presented to the Grand Jury by the Commonwealth and without evidence presented on behalf of the defendant." (T. Vol. II, 49).

The case proceeded with presentation of the Commonwealth's evidence described above. Defense counsel in his opening statement diagrammed the location of the apartment at the scene and summarized the evidence to be presented by two defense witnesses who testified as follows.

Marion Bates testified that he is retired and spends most of his time around the front porch or front of his residence at 266 East Main[2] (JA 85, 89). He recalled that, beginning around noon on May 6, 1981, he was in the driveway by his house using putty to plug a leak in his automobile windshield (JA 85-86). During this time a good friend and owner of the building at 268 East Main, Chuck Lambert, stopped by and invited

[2]Previous testimony established the victim's address as 270 East Main, Frankfort, Kentucky (JA 30) and petitioner's address as 268 East Main, Frankfort, Kentucky (JA 71-72).

Mr. Bates to see recent improvements to the basement of that building (JA 86-87). While they were in the basement beneath James' apartment, Mr. Bates heard no sounds other than James' record player (JA 88). When Mr. Lambert mentioned needing to be back at work at 1:00 p.m., they left the basement and Mr. Bates continued his work on the car (*Id.*). He could not recall how long he stayed outside that day cleaning out the car and "doing other things" but mentioned he often stayed out until 4:00 p.m. (JA 89). He recalled seeing James leave his apartment around 2:00 p.m. and walk in the direction of Kentucky State University (JA 88). James "hollered" a greeting to Mr. Bates as he customarily did (JA 88-89). Mr. Bates also recalled Mrs. James coming home while Bates was outside and stopping at his house to visit her friends, Dorothy and Annette, and/or to use the telephone (JA 90). Mr. Bates mentioned she often stopped by for these reasons. (*Id.*). He also testified he did not see James return nor did he see James and the victim walk between their buildings (JA 90-91).

On cross-examination Mr. Bates could not recall the day or month he was contacted by defense counsel concerning this case but thought it was four or five months ago (JA 91). He described the distance between James' and the victim's apartment as "short" and estimated walking time for that distance at "about a minute, I guess." (JA 92.) On redirect he responded he would have seen James on that date if James "walked from his -ouse (sic) down to his apartment" in the presence of a lady (JA 93).

Chuck Lambert testified he owned the rental property at 268 East Main and was in the process of slowly cleaning it up (JA 93). He and Mr. Bates "kind of had a daily relationship while [Lambert] was doing the work on the property." (JA 94). When asked if he recalled showing Mr. Bates the property on May 6, Mr. Lambert responded, "I don't recall showing the property to Mr. Bates on that particular date; but I've shown the property to Mr. Bates on many occasions." (JA 95.) He also said, ". . . if Mr. Bates said I showed him the property on that date then he would be correct." (*Id.*)

At this point in the trial the jury recessed for lunch (T. Vol. IV, 47). Upon their return, the following exchange occurred:

> "Judge Meigs: Ladies and gentlemen, I remind you once again of the admonition given before the recess and unless you indicate otherwise, I will assume that you have not discussed the case among yourselves nor allowed anyone to discuss it with you during the recess. Does the Commonwealth waive the call?
>
> Mr. Corns: We do, Your Honor.
>
> Judge Meigs: Does the defendant waive the call?
>
> Mr. Peale: We do, Your Honor.
>
> Judge Meigs: Call your witness. You have closed, I am sorry.
>
> Mr. Peale: We have closed and has a matter in regard to the instructions.

Off the Record

Mr. Peale: Note that the defendant objects to several of the instructions being given to the jury.

Judge Meigs: Overruled.

Mr. Peale: The defendant requests that an admonition be given to the jury that no emphasis be given to the defendant's failure to testify which was overruled.

Judge Meigs: Ladies and gentlemen of the jury, these are your instructions as to the law applicable to the facts which you have heard from the witness stand in the course of this trial. . . ." (JA 95; T. Red. Vol., 3-4.)

The jury was then instructed for each offense:

"You will find the defendant, Michael P. James, guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:" [elements of offense followed] (JA 5-6).

They were further instructed:

"The law presumes a defendant to be innocent of a crime, and the indictment or warrant shall not be considered as evidence or as having any weight against him. You shall find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty." (JA 6).

In his closing statement defense counsel reminded the jurors of the presumption of innocence which they

promised to afford James and the prosecution's burden of proving the case beyond a reasonable doubt (JA 96). He then turned to the instructions on each offense and argued, with respect to the burglary, "There is no evidence that Mr. James entered that house" (*Id.*). He dismissed the fingerprint on the inside of the storm door by arguing it could have been there for any length of time and further noted there were no fingerprints on the outside of the door (*Id.*) James' counsel turned to the rape charge and noted that no one saw them crossing the yard, despite the noon hour on a busy street and despite Mr. Bates' presence in the area (JA 97-98). He questioned why James would ask to use the victim's phone when Mr. Bates' phone was used often (JA 98). He further questioned why Mr. Bates did not see them leave even if he happened to miss their entry while he was in the basement (JA 98). The victim's upset demeanor upon reporting back to work was attributed to a fear of her authoritarian supervisor (JA 99). The victim's version of events was characterized as a "story" told for unknown reasons (JA 99). The victim's delay for an hour or so in reporting the crime was also questioned (JA 100). Defense counsel questioned why no blood sample was taken from Mrs. James to eliminate her saliva as that present on the cloth strip (*Id.*). The absence of corroboration of the victim's testimony was emphasized through the inconclusive testimony concerning the bullet as well as the limited quantity of semen which could not be tested (JA 101). Then the identification of the gun was challenged and the absence of documentation of pur-

chase or testing of the weapon (JA 102). In counsel's words, "There was nothing. Nothing. Nothing. How can there be proof beyond a reasonable doubt if there is nothing." (*Id.*). On at least ten occasions the prosecution's case was characterized as "no evidence" or "nothing." (JA 95-103.) The jury was lastly reminded of the presumption of innocence, the Commonwealth's burden and that there was nothing to establish "guilt beyond a reasonable doubt" (JA 102-103).

The prosecutor in his closing argument similarly reviewed the elements of each offense and the evidence presented. On the May 1, 1981, burglary charge the evidence showed an absence of permission to enter, the bottom glass panel of a back storm door removed, and a pane broken out of the kitchen door so that entry could be gained. A latent print, with twenty-six positive points identifying petitioner, was found on the inside bottom portion of the glass storm door (JA 105). The prosecutor reviewed the victim's testimony that petitioner had only been in the front of her apartment on previous occasions and the improbability of a six-foot, eleven-inch person leaving a fingerprint on the lower portion of this door in some innocent fashion (JA 105). James' observations and inquiries when the windows were nailed shut between April 23, 1981, and May 1, 1981, were noted (JA 105-106). The prosecutor responded to defense counsel's repeated argument that there was no evidence other than the victim's testimony by noting that her testimony was repeatedly corroborated and not contradicted (JA 106). Her reporting of the April 23, 1981, burglary and providing the serial

number of the stolen gun was mentioned along with her immediate reporting of the May 1, 1981 burglary (*Id.*). He described the discovery of a small metal slug, introduced by the defense, in a position consistent with the victim's testimony of an accidental firing of the .22 caliber pistol. The prosecutor reminded the jury that the victim's stolen pistol was missing only one live round when it was taken from James that night and that James also had in his possession two cloth strips which matched the victim's previous description down to the knot in one strip (JA 107-108). He further noted the report of saliva from a Group A secreter on the cloth strip and that the victim was a Group A secreter (JA 108). In response to defense counsel's inquiry regarding a blood test of Mrs. James, he said that information was not available to the prosecution and that the defense had not provided the information (*Id.*). He continued by discussing the testimony of direct threats, the considerable disparity in size between the victim and the accused, and the documentation of semen on the victim and on James' towel in limited quantities (*Id.*). He noted the victim's prompt reporting of the rape to her supervisor, the supervisor's testimony concerning her conduct and her related fear of the threats and that this close neighbor might not be immediately apprehended, and her reporting the crime to the police soon thereafter (JA 109). Turning to the charge of receiving stolen property, the prosecutor noted the serial number of the gun in James' possession May 6, 1981, matched that on the victim's police report of April 24, 1981 (JA 110). The jury was reminded

that two police officers observed petitioner pick up the bag containing the gun and strips of cloth as he left the gym (*Id.*). The prosecutor concluded by reviewing the verdict form, arguing the seriousness of the offenses involved and recommending the jury ' fix what [they] believe to be a reasonable punishment." (JA 111).

Following the return of a guilty verdict on all three charges, the case was continued until January 27, 1982 for the persistent felony offender stage of trial (T. Red Vol., 38-39; Transcript of Record [hereinafter "R"] p. 53). At that time the jury was apprised of James' 1972 forgery conviction in Nebraska and his 1973 guilty plea to the charge of murder committed in Virginia for which he received a sentence of 28 years. (T. Vol. V, 9-13). Other elements of the persistent felony offender offense were established, including James' date of birth as March 1, 1953, and the fact that he was on active parole from the Virginia murder when he committed the present offenses (T. Vol. V, 20-21, 29.)

James took the stand in his own defense at the persistent felony offender stage and stated he thought his pleas in Nebraska involved only a misdemeanor charge and that he served no time in prison on that offense (T. Vol. V, 33-35). He testified he never was required to report to a probation officer because the University of Nebraska handled everything for him (T. Vol. V, 36, 40). James denied appearing in court for probation revocation and denied any knowledge of court documents reflecting confinement in jail until he could make arrangements to return to Virginia in July of

1972 (T. Vol. V, 31-42). He acknowledged returning to Virginia in July or August, 1972 and subsequently serving time in that state, but not on the forgery charge (T. Vol. V, 43, 45-46). James was found guilty as a first-degree persistent felon pursuant to KRS 532.080 and his sentence on the rape charge enhanced from twenty years to life (T. Vol. V, 45-47).

On direct appeal of his conviction to the Supreme Court of Kentucky as provided for under its rules, James acknowledged that trial counsel "requested an 'admonition' rather than a written instruction" but argued that the requested admonition is constitutionally mandated by this Court's decision in *Carter* v. *Kentucky,* 450 U. S. 288, 305 (1981).[3]

The Commonwealth of Kentucky responded on appeal that *Carter* entitles a defendant only to an instruction upon request and that Kentucky has long distinguished between admonitions and instructions and the purposes of each. Alternatively, the state argued that if there had been error, it was harmless. The Supreme Court of Kentucky held that no instruction had been requested and, in light of the difference between an admonition and an instruction, the request for an admonition had been properly denied (JA 114).

The petition for certiorari was granted October 17, 1983.

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[3]The state court arguments of petitioner and the Commonwealth of Kentucky are reproduced as an addendum herein for the convenience of the court.

SUMMARY OF ARGUMENT

In *Carter* v. *Kentucky* this Court held that the Fifth Amendment compels state trial courts to provide, upon request, a prophylactic jury instruction concerning a criminal defendant's failure to testify. Since opinion and practice vary widely among jurisdictions regarding the method of instructing a jury, implicit in this holding was that a *Carter* instruction would be provided in the same manner as all other jury instructions in that jurisdiction.

Kentucky promptly amended its Rules of Criminal Procedure to require that the *Carter* instruction be included with other written instructions upon request. Kentucky's interest in its requirement for written instructions includes full and accurate guidance to the jury; avoidance of misunderstanding or misconstruction of the law by jurors, counsel or the court; a clear understanding between the court and counsel as to the instructions requested and to be given; avoidance of error from hasty, extemporaneous charges to a jury, expedited trials and reduction in errors or retrials arising from disputes about the oral charge or frequent recharging on points not remembered or comprehended by all. Kentucky also historically and consistently has distinguished between "admonitions" defined as oral advice or caution by the court to the jury, and "instructions" which contain the controlling law of the case and must be given in writing absent clear and affirmative waiver on the record.

The Kentucky trial court correctly denied James' unexplained request for an isolated "admonition" on

his failure to testify since the full measure of the *Carter* protection was available to James, but not requested, and he has never asserted any interest or authority, other than *Carter*, to support his request for a form of relief not available or appropriate under long established practice and procedure. James' assertion that *Carter* compels relief in the form of any alleged functional equivalent of an instruction clouds the clear and final mandate of *Carter*.

State rules of procedure which encourage trial proceedings as free of error as possible and resolution of all issues at the time when society's resources are concentrated to decide the question of guilt or innocence make a major contribution to finality in criminal litigation. The Fifth Amendment does not require each state to employ what some consider to be better or wiser methods of practice and procedure. It compels only that, upon request, an instruction on a defendant's failure to testify be given in the same manner as all other instructions in that jurisdiction. The Supreme Court of Kentucky correctly interpreted *Carter* as so holding and its decision should be affirmed.

Even if this Court should determine that an admonition is constitutionally mandated, Kentucky submits that the denial of James' request was harmless error under the facts and circumstances of this case.

ARGUMENT

The Supreme Court of Kentucky Correctly Concluded That, While a No Inference Instruction Is Required To Be Given When Requested, Pursuant to *Carter* v. *Kentucky*, the Privilege Against Compulsory Self-Incrimination Does Not Mandate the Granting of an Unexplained Alternative Defense Request in the Form of an Admonition to the Jury Where Such a Request Conflicts With Established State Practice and Procedure.

A. *Carter* Mandates A Jury Instruction Upon Proper Request.

The Court in *Carter* v. *Kentucky*, 450 U. S. 288 (1981), carefully considered the Fifth Amendment privilege against self-incrimination and the unique value of jury instructions "to direct the jurors' attention to important legal concepts that must not be misunderstood, such as reasonable doubt and burden of proof." *Id.*, at 299. The Court noted:

> "We have repeatedly recognized that 'instructing a jury in the basic constitutional principles that govern the administration of criminal justice,' *Lakeside*, 435 U. S., at 342, is often necessary. Jurors are not experts on legal principles; to function effectively, and justly, they must be accurately instructed in the law."
>
> * * * * * * *
>
> "A trial judge has a powerful tool at his disposal to protect the constitutional privilege—the jury instruction—and he has an affirmative obligation to use that tool when a defendant seeks its employment. No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power

> of the jury instruction to reduce that speculation to a minimum." *Id.*, 450 U. S., at 302-303.

Thus, a new rule of constitutional law was created requiring that a prophylactic instruction be given when the defendant makes a timely and proper request.

We believe the *Carter* opinion, expressing a constitutional rule applicable to all states, was thoughtfully drafted so that the constitutional principle could be protected by all states without undue encroachment upon established trial procedures and a state's determination of the "best" method of educating the jury on the law of the case. This Court no doubt recognized the variation and experimentation among the states regarding jury instructions. By 1976 well over one-half of the states used pattern jury instructions and development of such instructions was in progress in other states.[4] Some authorities state these instructions are simply available for use while others presume errors from unnecessary modification of the pattern instructions.[5] State statutes and rules of practice differ on whether requested instructions must be submitted in writing.[6] Additionally, there is disparity of opinion as to the manner of delivering jury instructions. One judge discussed the dilemma as follows:

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[4]National Center for State Courts, Facets of The Jury System 30-31 (1976); NDAA, National Prosecution Standards, Appendix 17.8-1.

[5]American Bar Association, *Standards for Criminal Justice*, Trial By Jury, §15-3.6(b). (2nd Ed. 1980) Comments, pp. 15.104-105.

[6]*Id.*, §15-3.6(c) Comments.

> "Spontaneous oral delivery may accomplish understanding more readily but is fraught with the danger of reversal by the appellate court which considers the printed word out of its environment of the trial. A judge who instructs conversationally without a prepared script tends to ramble, to weaken his statements and to become obscure. Occasional use of conversational language maintains attention; its continued use is dangerous and not always convincing."[7]

The American Bar Association Commission on Standards of Judicial Administration determined that:

> "All jury instruction techniques necessarily involve accommodations among the sometimes conflicting objectives of technical accuracy, intelligibility to a lay audience, and the simplicity of procedural administration." ABA Standards, Trial Court §2.13, Comment p. 35.

Finally, courts differ on the benefits or prejudicial effect of sending written instructions with the jury for use during its deliberations in a criminal case. Compare *Copeland* v. *United States,* 152 F. 2d 769 (D.C. Cir. 1945), affirming trial court's denial of jury's request for written instructions when both counsel objected but seeing no reason the jury must be forced to rely on its recollections; *Manner* v. *Raskin,* 113 Ariz. 3, 545 P. 2d 927 (1976), noting mandatory practice of sending written instructions into the jury room in criminal trials; *Sanders* v. *State,* 264 Ind. 688, 348 N. E. 2d 642 (1976), where the trial judge was said to have contravened prevailing practice by permitting the

[7] R. McBride, *The Act of Instructing the Jury* (1969) at 191.

jury to take the final instructions to the jury room; and *Commonwealth* v. *Baker,* 466 Pa. 382, 353 A. 2d 406 (1976) in which the court said that by sending only the verdict form the jury might overemphasize the matters touched on in the writings and concluded the dangers inherent in this procedure outweighed the possible benefits.

The *Carter* opinion accommodated these diverse viewpoints and rules of practice by requiring only that an instruction, in whatever form or manner is utilized for other instructions in the jurisdiction, be given if requested.

Promptly after the *Carter* decision, Kentucky amended its Rule of Criminal Procedure [hereinafter "RCr"] 9.54, to add subsection (3). The rule in effect at the time of James' trial was as follows:

> "RULE 9.54 INSTRUCTIONS.
>
> (1) It shall be the duty of the court to instruct the jury in writing on the law of the case. The instructions shall be read to the jury prior to the closing summations of counsel.
>
> (2) No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.
>
> (3) The instructions shall not make any reference to a defendant's failure to testify unless so requested by him, in which event the court shall give an instruction to the effect that he is not compelled

> to testify and that the jury shall not draw any inference of guilt from his election not to testify and shall not allow it to prejudice him an any way.
>
> [Amended effective March 1, 1974; September 1, 1981.]"

Kentucky has long required written jury instructions to be submitted to the jury when they begin deliberations. In *Allen* v. *Commonwealth,* 148 Ky. 327, 146 S. W. 762 (1912), one purpose of the requirement was explained as follows:

> "It is of the highest importance that the jury should be accurately and fully advised as to the law applicable to the case when they retire to their jury room to consider the verdict and determine the guilt or innocence of the accused by the application of the law as given by the court to the evidence as related by the witnesses. It was to prevent misunderstanding or misconstruction of the law that the Code provision was inserted, requiring instructions to be in writing. If the instructions are oral, the jurors may have different views as to what the court stated was the law of the case, and this, of course, might often result to the prejudice of the accused. But when the jury have before them in writing the law of the case, there is no room for misunderstanding or dispute as to what it is; and the probability that the accused will be prejudiced by error of the jury in understanding and applying the law is largely, if not altogether, removed." *Id.,* 146 S. W., at 763.

Additional interests served by a mandatory requirement for written instructions include: (1) compliance with the rule ensures that the jury will always have

before them, plainly written out, the rules of law they are to apply in a particular case, (2) juries, being untrained in the law and unfamiliar with its technical language, will almost of necessity have an indistinct recollection of the charge given them by the judge, (3) both the defendant and the state are entitled to a sound exposition of the law, (4) there should be no misunderstanding between the court and counsel as to the instructions requested and/or the instructions to be given, (5) written instructions prevent the evil of repeated retrials resulting from errors committed in hasty, extemporaneous charges to the jury, and (6) the trial of criminal cases is expedited by ending not only disputes among the jurors as to what the oral charge was but also the jurors' frequent return into court to be recharged on points not remembered or comprehended by all. See also: Comment, *The Jury Instruction Process—Apathy or Aggressive Reform?*, 49 Marq. L. Rev. 137, 139 (1965).

Kentucky's RCr 9.54 is consistent with related American Bar Association Standards,[8] except that no position was taken in the standard on whether all instructions should be in writing.[9] Kentucky's requirement is mandatory and the giving of oral instructions may constitute reversible error. *Bartram* v. *Commonwealth*, 233 Ky. 244, 25 S. W. 2d 378 (1930); *Gipson* v. *Commonwealth*, 251 Ky. 793, 66 S. W. 2d 16 (1933);

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[8]See: ABA Standards, Trial by Jury, §15-3.6; ABA Standards, Trial Courts, §2.13.

[9]ABA Standards, Trial by Jury, §15.3.6(e), Commentary, pp. 15.110-111.

Hounchell v. *Commonwealth*, 273 Ky. 172, 116 S. W. 2d 332 (1938). Kentucky law does provide for the giving of oral instructions upon request by the defense, but in a felony case "it must affirmatively and clearly appear that the accused consented to the jury's being instructed orally or that he waived his right to have them instructed in writing." Palmore, *Kentucky Instructions to Juries*, §1.51 (1975 Revision of Stanley), p. 21; See: *Hart* v. *Commonwealth*, 198 Ky. 844, 250 S. W. 108, 109 (1923) (reversing because the record was inadequate to show an affirmative waiver by the defendant.)

Consistent with the foregoing principles, Kentucky has long distinguished between the terms "admonition" and "instruction." Admonitions are given orally; instructions must be in writing absent clear waiver. Admonitions before and after recesses and other times while the trial is not in progress are designed to advise or caution jurors concerning their duty or conduct as jurors.[10] Admonitions during the course of trial are curative and for the purpose of removing from or limiting the jury's consideration of evidence improperly placed before them.[11] These admonitions are to be re-

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[10]See, for example, the admonition given just preceding the request at issue here:

"Ladies and gentlemen, I remind you once again of the admonition given before the recess and unless you indicate otherwise, I will assume that you have not discussed the case among yourselves nor allowed anyone to discuss it with you during the recess." (T. Red Vol., 3).

[11]See, for example, the ten admonitions cited by petitioner in the Appendix to his brief.

quested at the time the evidence is heard but may be given at the conclusion of that witness' testimony. See: *Bell* v. *Commonwealth,* Ky., 473 S. W. 2d 820, 821 (1971); *Brewer* v. *Commonwealth,* Ky. App., 632 S. W. 2d 456, 457 (1982). While perhaps other jurisdictions and certainly some writers may use the terms differently or interchangeably,[12] Kentucky clearly and consistently has required its practitioners to be mindful of the foregoing distinction.

As early as 1922, in *Miller* v. *Noell,* 193 Ky. 659, 237 S. W. 373 (1922), the highest court in Kentucky made it clear that there is a susbtantial difference between an "admonition" and an "instruction."

> ". . . [A]n 'admonition' is any authoritative oral communication or statement by way of advice or caution, made by the court to the jury during the trial of a case, respecting their duty or conduct as jurors, the admissibility or nonadmissibility of evidence offered by the parties, or the purpose, if competent only for a particular purpose, for which any of that admitted might or should be considered by them. But by the Civil Code of Practice and the courts of the state *the term 'instructions' has a wholly different legal meaning.* The instructions are from the court and

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[12]See *Wigmore on Evidence,* §13 (Tillers rev. 1983), p. 697. In discussing evidence admissible for a limited purpose, the author states:

"Here the only question can be what the proper means are for avoiding the risk of misusing the evidence. It is uniformly conceded that the instructions of the court suffice for that purpose, and the better opinion is that the opponent of the evidence must ask for that instruction."

> addressed to the jury, and contain the law of the case by which they are to be guided and controlled in arriving at a verdict." *Id.* at 374. [Emphasis added].

Since *Miller,* the Kentucky courts have consistently and repeatedly adhered to the distinction between admonitions and instructions as the following cases illustrate. In *Brown* v. *Simpson,* 293 Ky. 277, 170 S. W. 2d 345 (1943), a civil action for damages for assault and battery, appellant complained that the trial court's admonition limiting the effect of reputation evidence was incomplete. Citing *Miller,* the appellate court noted the absence of any objection and declined to rule on the alleged error in the admonition. *Id.* at 347. The opinion continued:

> "This Miller case also disposes of Brown's contention that the admonition was an instruction and the court having given it sua sponte it was incumbent upon him to give it correctly, by pointing out that an 'admonition' is but an oral statement by way of advice made by the court to the jury during the trial respecting the purpose for which such evidence may be considered; while 'instructions' are always written, unless the parties agree otherwise, and contain the law of the case which guides the jury in reaching a verdict." *Id.*

Again, in *Evans* v. *Commonwealth,* 299 Ky. 273, 184 S. W. 2d 981, 985 (1945) the court said:

> "We therefore hold that an admonition, such as the court gave here relating to the weight to be given to the testimony of an accomplice, is not an

> instruction embraced within section 225,[13] *supra*, of the Criminal Code of Practice. . . ." [requiring instructions to be in writing.]

In *Weichhand* v. *Garlinger*, Ky., 447 S. W. 2d 606 (1969) the court held it error, but harmless error, to give an admonition that evidence of a criminal conviction was not conclusive on the question of negligence in a related civil action. In discussing the issue, the court again emphasized the distinction between requests for instructions and admonitions:

> "On the trial of the instant case evidence of the criminal conviction was admitted, over Garlinger's objections. He made no request, at the time of admission, for any *admonition*. However at the close of the trial he requested an *instruction* that the criminal conviction could be considered as evidence of negligence but was not conclusive. The trial court refused to give such an *instruction* but did give an *admonition* to that effect." *Id.* at 610. [Emphasis by the Court.]

In his pattern jury instruction text the former Chief Justice of the Supreme Court of Kentucky states:

> "Oral admonitions in reference to questions of evidence made during the progress of trial, not being on the merits of the prosecution or defense, are not instructions within the meaning of the criminal rule of procedure which requires all instructions to be in writing, or within the rule that the court must give the whole law of the case."

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[13]Criminal Code of Practice Sec. 225 was the precursor of RCr 9.54 in Kentucky.

Palmore, *Kentucky Instructions to Juries,* §1.31 (1975 Rev. of Stanley), p. 16.

The difference between an admonition and an instruction is further apparent in the following definitional sources:

"The word admonish means to caution or advise." *Guth* v. *People,* 402 Ill. 286, 83 N. E. 2d 590, 591 (1949); *People* v. *Pennington,* 267 Ill. 45, 107 N. E. 871, 872.

"Admonish. To caution or advise. To counsel against wrong practice, or to warn against danger of an offense." *Black's Law Dictionary,* 4th Ed. (1957), p. 69, and 5th Ed. (1979), p. 45.

"Instruction. Trial Practice. A direction given by the judge to the jury concerning the law of the case; a statement made by the judge to the jury informing them of the law applicable to the case in general or some aspect of it; an exposition of the rules or principles of law applicable to the case or some branch or phase of it, which the jury are bound to accept and apply. The generally accepted meaning of the word instruction, when applied to courts, means a direction that is to be obeyed." *Black's Law Dictionary,* 4th Ed. (1957), p. 941; See also: 5th Ed. (1979), "jury instructions," p. 769.

Likewise, Kentucky courts have consistently held under RCr 9.54(2) that no claim of error regarding instructions may be raised on appeal unless the position urged was fairly and adequately presented to the trial

court by tendered instruction or by motion or by objection, stating specifically the grounds in support.[14]

Rather than follow these established procedures, petitioner failed to place on the record a clear and affirmative waiver of the written instruction requirement and further asked the court to risk reversible error by any or all of the following: (1) giving an "admonition" rather than an "instruction," (2) isolating one item from the law of the case and treating it in a substantially different manner from all others, or (3) granting the request even though counsel had not fairly and adequately presented his position by an offered written instruction or by motion or by making an objection which specifically stated his grounds.

To date petitioner has yet to cite any authority permitting partially oral and partially written instructions, any interest he has in such a request, or any manner in which he would have been prejudiced by entirely written or entirely oral instructions which would include a "no adverse inference instruction." Nor has he cited any Kentucky authority which would bring his request within the recognized definition of admonition. It must be noted that counsel did not refer to the court's written instructions as admonitions in

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[14]See, for example: *Sampson* v. *Commonwealth*, Ky., 609 S. W. 2d 355, 360 (1980); *Wilson* v. *Commonwealth*, Ky., 601 S. W. 2d 280, 285 (1980); *Nickell* v. *Commonwealth*, Ky., 565 S. W. 2d 145, 148 (1978); *Long* v. *Commonwealth*, Ky., 559 S. W. 2d 482, 484-485 (1977); *Eversole* v. *Commonwealth*, Ky., 550 S. W. 2d 513, 515-516 (1977); *Hunt* v. *Commonwealth*, Ky., 466 S. W. 2d 957, 959 (1971); *McCranney* v. *Commonwealth*, Ky., 449 S. W. 2d 914, 915 (1970).

his previous breath (JA 95). He correctly referred to them as "instructions." Yet he plainly chose the term "admonition" seconds later when he stated his request for relief. (*Id.*)

The Commonwealth of Kentucky has never regarded this case as simply a question of semantics or some word game. Rather, the issue is the scope of the Fifth Amendment protection associated with a possible adverse inference arising from a defendant's failure to testify. This Court in *Carter* established a clear preventive rule to be applied in all jurisdictions. The decision in *Carter* was not the beginning of inquiry on this subject but, rather, we believe it was designed to be the end, save the question of harmless error.

Bruno v. *United States,* 308 U. S. 287 (1939), interpreted the legislative intent of 18 U.S.C. §3481 as "an implied direction to judges to exercise their traditional duty in guiding the jury by indicating the considerations relevant to the latter's verdict on the facts" and held that the substance of the requested instruction should have been granted. *Id.,* 308 U. S. at 293, 294. In *Griffin* v. *California,* 380 U. S. 609 (1965) the Court considered a California constitutional provision stating in part:

> ". . . in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." California Constitution, Article I, §13; *Id.,* 380 U. S., at 610, note 2.

Such a rule, permitting repeated prosecutor comments explicitly referring to the defendant's failure to take the stand and the trial court's acquiescence therein, constituted a solemnization of "the silence of the accused into evidence against him. . . ." *Id.*, 380 U. S., at 614. This Court held:

> ". . . That the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id.*, 380 U. S., at 615.

The question whether an accused could require a jury instruction that his silence must be disregarded was expressly reserved. *Id.*, 380 U. S., at 615, note 6. The issue of the Fifth Amendment and jury instructions was considered again in *Lakeside* v. *Oregon*, 435 U. S. 333 (1978), wherein a "no adverse inference" instruction was given over the defendant's objections. The Lakeside Court concluded:

> "It may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection. And each state is, of course, free to forbid its trial judges from doing so as a matter of state law. We hold only that the giving of such an instruction over the defendant's objection does not violate the privilege against compulsory self-incrimination guaranteed by the Fifth and Fourteenth Amendments." *Id.*, 435 U. S., at 340-341.

* * *

> "Yet the petitioner argues that his constitutional right to counsel means that this instruction could constitutionally be given only if his lawyer did not object to it. We cannot accept the proposition that

> the right to counsel, precious though it be, can operate to prevent a court from instructing a jury in the basic constitutional principles that govern the administration of criminal justice." *Id.*, 435 U. S. at 342.

The remaining question, reserved in *Griffin, supra,* was resolved in *Carter* v. *Kentucky* when the court announced a per se rule, that upon proper request, a defendant has a right to a prophylactic instruction under the Fifth and Fourteenth Amendments.

Petitioner here urges this Court to make the plain rule of *Carter* the beginning of another round of litigation rather than the resolution of the issue. The unanswered questions would include: In what "form" must the instruction be given? When must it be given? If requested, must it be given more than once or in both an oral and written manner? If an admonition is the "functional equivalent" of an instruction, what other "functional equivalents" might there be? When has a defendant substantially complied with the requirement of a "request"? How is a trial judge to know, in the heat of trial, that when defense counsel says one thing he really means something else?

At least one Court has already considered an admonition given during jury selection and held:

> "But such preliminary admonition is no substitute for the required instruction which must be given with others as the jury prepares to deliberate." *United States* v. *Patterson*, 648 F. 2d 625, 631 (9th Cir. 1981).

In a Fourth Amendment context it was said:

> "Our entire profession is trained to attack 'bright lines' the way hounds attack foxes. Acceptance by Courts of arguments that one thing is the 'functional equivalent' of the other, for example, soon breaks down what might have been a bright line into a blurry impressionistic pattern." *Robbins* v. *California,* 453 U. S. 420, at 443 (1981). (Rehnquist dissenting).

In the present case Kentucky fully complied with the mandate of *Carter* by providing an automatic right, upon proper request, to a "no adverse inference" instruction to be given in the same manner as all other instructions. RCr 9.54(3). The Supreme Court of Kentucky recognized James' right to such an instruction but affirmed the trial court's denial of his alternative request.

> "James requested that the trial court give an 'admonition' to the jury that no emphasis be given to James' failure to testify. This request was denied by the trial court. In his argument on this appeal James attempts to equate this request for an admonition with a request for an 'instruction' on failure of a defendant to testify. *Carter* v. *Kentucky,* 450 U. S. 288, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981), held that a state trial judge has the constitutional obligation to give a prophylactic instruction upon proper request to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify. There is a vast difference in a request for an admonition and a requested instruction. James was entitled to the instruction, but did not ask for it. The trial court

properly denied the request for an admonition." *James* v. *Commonwealth,* Ky., 647 S. W. 2d 794, 795-796 (1983).

Petitioner urges this Court to hold that the privilege against compulsory self-incrimination compels state courts to grant a request not only for an "instruction" but also for an admonition or other alternative relief regardless of the impact upon established state practice and procedure. He argues the decision of the Supreme Court of Kentucky on procedural grounds:

> ". . . represents an obvious attempt by that court to circumvent the mandate of this court in *Carter* v. *Kentucky* and deprives petitioner of the benefit of judicial guidance as to the jurors' understanding of the privilege against compulsory self-incrimination."

In *Wolfe* v. *North Carolina,* 364 U. S. 177 (1960), the Court considered a similar allegation, that the Supreme Court of North Carolina's decision not to consider a claim of racial discrimination due to the petitioner's procedural failure to complete the trial record, was untenable and inadequate in light of the constitutional right involved. That claim was rejected as follows:

> "Examination of the whole course of North Carolina decisions thus precludes the inference that the Supreme Court of North Carolina in this case arbitrarily denied the appellant an opportunity to present their federal claim. . . . Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts. The mode and

> time of invoking that jurisdiction, and the rules of practice to be applied in its exercise, and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law.' [Citations omitted.] '[W]hen as here there can be no pretence that the [state] Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong.' " *Id.*, at 194-195.

The North Carolina Supreme Court did not decide the federal question raised "because of the requirement of rules of state procedural law within the constitutional power of the states to define, and here clearly delineated and evenhandedly applied." *Id.*, at 196. Similarly, the Kentucky Supreme Court declined to decide whether there was constitutional error in the failure to give an instruction on the right not to testify because no such instruction was requested and petitioner failed to follow the requirements of state procedural law.

Subsequently this Court, on review of a habeas corpus claim, declined to consider whether a confession was improperly admitted into evidence at a state trial. *Wainright* v. *Sykes*, 433 U. S. 72 (1977).

> "We therefore conclude that Florida procedure did, consistently with the United States Constitution, require that respondent's confession be challenged at trial or not at all, and thus his failure to timely object to its admission amounted to an

> independent and adequate state procedural ground which would have prevented direct review here." *Id.*, 433 U. S., at 87-88.

In rejecting the "sweeping language of *Fay* v. *Noia*," 372 U. S. 391 (1963), which required a "knowing and deliberate waiver of the federal constitutional contention," the Court emphasized the "major contribution to finality in criminal litigation" fostered by a contemporaneous objection rule. *Id.*, 433 U.S., at 87-88.

> "The failure of the federal habeas corpus courts generally to require compliance with a contemporaneous objection rule tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event. A defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding; the accused is in the court-room, the jury is in the box, the judge is on the bench, and the witnesses having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the questions of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification.
>
> We believe the adoption of the Francis rule in this situation will have the salutary effect of making

> the state trial on the merits the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." *Id.*, 433 U. S., at 90.

In a similar manner, state decisions that written instructions accurately apprise the jury of the law of the case and prevent unnecessary delays or retrials and requirements that requests for instructions be made in conformity with established practice or that, at least, the grounds for a nonconforming request be made clear to the trial judge, serve the salutary purpose of encouraging final resolution of all issues at the state trial on the merits.

James relies on the case of *Henry* v. *Mississippi*, 379 U. S. 443 (1965), which the Court remanded for consideration of the possible issue of waiver. James' reliance on *Henry* for the proposition that compliance with procedural rules may be unnecessary appears misplaced in light of the *Wainwright* court's explanation of the holding as follows:

> "In Henry v. Mississippi, 379 U. S. at 451, the Court stated that decisions of counsel relating to trial strategy, even when made without the consultation of the defendant, would bar direct federal review of claims thereby forgone, except where 'the circumstances are exceptional'." *Wainwright, supra,* 433 U. S. 72, at 91, note 14.

Petitioner has not urged any exceptional circumstances here.

Kentucky submits that the present case bears a stronger resemblance to the due process challenge of

the unitary habitual offender proceeding in *Spencer* v. *Texas*, 385 U. S. 554 (1967) where this Court said:

> "Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. [Citations omitted.] But it has never been thought that such cases establish this Court as a rule-making organ of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority. . . . As Mr. Justice Cardozo had occasion to remark, a state rule of law 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.' Snyder v. Massachusetts, 391 U. S. 97, 105." *Id.*, 385 U. S., at 563-564.

This Court explained that determination of the "best" procedure requires consideration of a wide variety of criteria including adequacy of notice and an opportunity to challenge evidence, the allocation in a particular jurisdiction of responsibility between the court and jury, the method best accommodated to the State's established trial procedures, and which method is apt to be the least prejudicial. *Id.*, 385 U. S. 567. "Tolerance for a spectrum of state procedures" was deemed to be especially appropriate. *Id.*, 385 U. S. at 566. See also: *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), and *Williams* v. *Florida*, 399 U. S. 78 (1970), considering state practices relating to jury size and unanimity.

In the case at bar, Kentucky in no way denigrated the privilege against compulsory self-incrimination by requiring that the constitutionally required instruction be given in some manner different from other instructions on the law of the case. James, however, urges this Court to hold that the decision in *Carter* gives rise not only to an instruction in conformity with state procedure but also to entitlement to any "practical substitute" requested by defense counsel, whether or not accommodated by established trial procedure. In other words, the Fifth Amendment privilege is not simply equal to all other constitutional rights but is superior and deserves extraordinary treatment when requested.

Among other problems presented by this approach is the determination of what is or is not a practical substitute for an instruction to the jury. When the constitutionally-rooted mandate of *Carter* is confined to an instruction to the jury upon request, there is no doubt. In each state, in every jurisdiction, the providing of a jury instruction can be uniform and without equivocation. Expanding the constitutional mandate in *Carter* to a court being required to recognize and carry out what any given defense counsel may believe to be a "functional equivalent" or practical substitute for a jury instruction precipitates disagreements and misunderstandings of defense tactics by trial judges, state appellate courts and federal habeas courts. The consequence is extended litigation based on hindsight or speculation. Surely, such is not the mandate of *Carter*. Again, Kentucky has accepted this

Court's prophylactic constitutional rule as enunciated in *Carter*. The constant dripping of water on a rock over a period of time will eventually erode away the rock. What James is asking this Court to do is to let the dripping begin. If this is permitted, in time there will be no certainty as to what a court must do at the request of a defendant regarding the no-inference rule rooted in the Fifth Amendment, but rather the court's decision, if the request is not granted, will always be subject to review as to whether the requested action is the "functional equivalent" of an instruction.

Kentucky urges this Court to hold that the language of *Carter* means what it says. Upon request, a criminal defendant is entitled to a jury instruction that there be no adverse inference from his failure to testify. The Supreme Court of Kentucky correctly interpreted the *Carter* opinion as so holding. Its decision should be affirmed.

B. Even If It Is Determined That An Admonition Was Constitutionally Required, Denial Of The Requested Admonition, Under The Facts Of This Case, Was Harmless Error.

Should this Court decide that a criminal defendant is entitled, upon request, to an admonition or to some other practical substitute concerning his failure to testify, Kentucky submits that the error in denying James' request was harmless error under the totality of the circumstances.

In *Chapman* v. *California*, 386 U. S. 18 (1967), this Court clarified that federal, rather than state law, applies to any determination of what constitutes harm-

less error when the error involves denial of a federal constitutional right. While this Court emphasized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error" (386 U. S. at 23), it appears this Court did not believe that references by the court and prosecutor to the defendants' failure to testify were in that category. Instead, this Court applied the standard articulated in *Fahy* v. *Connecticut,* 375 U. S. 85 (1963), and held reversal is inappropriate when the comments did not contribute to the verdict.[15] *Chapman, supra,* 386 U. S., at 24.

Subsequent to *Chapman,* this Court has consistently refused to reverse state and federal convictions for constitutional errors which it deemed harmless. See, *e.g., Chambers* v. *Maroney,* 399 U. S. 42, 52-53 (1970) (Fourth Amendment); *Brown* v. *United States,* 411 U. S. 223, 231-232 (1973) (Sixth Amendment); *Milton* v. *Wainwright,* 407 U. S. 371 (1972) (same); *Schneble* v. *Florida,* 405 U. S. 427, 432 (1972) (same); *Harrington* v. *California,* 395 U. S. 250 (1969) (same). In other cases where it has found errors of a constitutional magnitude, the Court has often remanded the case for a determination of whether the error was harmless. See, *e.g., Moore* v. *Illinois,* 434 U. S. 220, 232 (1977) (Sixth Amendment); *Coleman* v. *Alabama,* 399 U. S. 1, 11 (1970) (same); *United States* v. *Wade,* 388 U. S. 218, 242 (1967) (same).

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[15]Under the facts of *Chapman* this Court concluded the error of repeated and direct references to the defendants' silence, coupled with sufficiently inconclusive evidence, was not harmless.

Last term, this Court reiterated its affirmative rejection of a per se rule requiring automatic reversal in cases involving violations of *Griffin* v. *California,* 380 U. S. 609 (1965), *i.e.,* prosecutorial comment on a defendant's failure to testify. *United States* v. *Hasting,* 461 U. S. ——, ——, 103 S. Ct. 1974, 1980 (1983).

> "Since Chapman, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations, see, e.g., Brown [v. United States, 411 U. S. 223, 230-232 (1973)]; Harrington v. California, 395 U. S. 250 (1969); Milton v. Wainwright, 407 U. S. 371 (1972)." *Id.,* 461 U. S., at ——, 103 S. Ct., at 1980.

The test to be applied in such cases was stated as follows:

> "The question a reviewing court must ask is this: absent the prosecutor's allusion to the failure of the defense to proffer evidence to rebut the testimony of the victims, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?" *Id.,* 461 U. S., at ——, 103 S. Ct., at 1981.

While the question of whether it can be harmless error to refuse to give a requested no-inference instruction was expressly left open in *Carter,* since the argument was not raised in state court, several state courts subsequently have recognized their duty to determine whether *Carter* violations are harmless. Applying the *Chapman* standard in *Richardson* v. *State,* Miss., 402 So. 2d 848 (1981), the Court affirmed the conviction

after noting identification of the defendant as the burglar and his guilt of the crime were proved by overwhelming evidence. In *Franklin* v. *State,* Nev., 646 P. 2d 543 (1982), the Court said, in affirming the conviction:

> "We have already noted the analogous relationship between the *Griffin* and *Carter* holdings; we can see no justification for applying a different standard of review to the rule announced in *Carter.* We join several other jurisdictions which have determined that *Carter* did not abrogate the *Chapman* test: The error is not reversible if the Court determines that it was harmless beyond a reasonable doubt."

In *Parker* v. *State,* Ind., 425 N. E. 2d 628 (1981), the court recognized the applicability of the harmless error rule to *Carter* violations, although the case was decided on the ground that the instruction was not requested. Most recently, the Supreme Court of Kentucky held that the refusal to give a *Carter* instruction was harmless error where the evidence supporting a charge of receiving stolen property included notice to the defendant that the guns were stolen, storage of the guns near the defendant's home and evidence of his distribution of the guns with warnings that the recipients should get rid of them. *Commonwealth* v. *McIntosh,* Ky., 646 S. W. 2d 43 (1983).[16]

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[16]Compare: *People* v. *Crawford,* Colo. App., 632 P. 2d 626 (1981); *Mosley* v. *State,* Fla. App., 402 So. 2d 559 (1981); *Brown* v. *State,* Tex. Cr. App., 617 S. W. 2d 234 (1981), in which neither harmless error nor the facts were discussed and an automatic reversal rule apparently imposed.

In the present case, the question of harmless error was plainly presented to the Supreme Court of Kentucky (see: Addendum, Brief for Appellee) but that court felt it unnecessary to address the issue due to James' failure to request an instruction. As in *Hasting,* this Court has before it the same record reviewed by the Supreme Court of Kentucky and is "in precisely the same position of that Court in addressing the issue of harmless error." 461 U. S. at ——, note 8.

We believe that, absent the denial of the requested admonition, it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty.

At trial the victim unequivocally identified her May 6, 1981, attacker as Mike James, a neighbor whom she knew only by his first name (JA 32, 63, 71). From her report and other available information, the police were able to identify petitioner and to apprehend him at a basketball game later that evening. (JA 55, 71-72). James was observed picking up a gym bag from the bleachers as he prepared to leave the gymnasium before he was apprehended at the exit (JA 55, 62). The bag contained a .22 caliber pistol with the same serial number as the gun the victim reported stolen from her apartment on April 23, 1981 (JA 57-58). It also contained two cloth strips matching the victim's description of the items used to bind and gag her (JA 58). Saliva from a person with the same blood type as the victim's was found in the knot of the cloth strip described as that used for a gag (JA 36, 58, 77-78). A metal slug was found in the victim's front room in a position consistent with her description of James' acci-

dental firing of the pistol, and the gun in his possession that evening was missing only one live round (JA 59, 73, 76). Following the May 6 hospital examination of the victim, laboratory reports revealed semen in the vaginal swabs, vaginal smear, a tampon, and her panties (JA 54, 79). On the inside lower portion of a storm door panel discarded during the May 1, 1981, burglary of the victim's apartment, the police found a fingerprint which was conclusively established as James' print (JA 51-52, 76-77).

The defense presented testimony that James was seen alone May 6 leaving his apartment at a time inconsistent with the victim's testimony of the facts (JA 85-88). There was a strong inference, however that Mr. Bates might have been mistaken about the date since he observed James' coming and going regularly or that he might have forgotten the exact date during the months between the rape, the first contact by defense counsel, and the trial (JA 88-91). Bates' testimony that he did not see James or the victim enter or leave James' apartment was not inconsistent with other testimony concerning the time Bates was in the basement, the time he remained in the yard, and the victim's testimony that James made sure they were not seen (JA 85-93, 33-34).

In short, the direct and circumstantial evidence of James' guilt was overwhelming. Under the totality of the evidence and the whole record of the case, it must be said beyond a reasonable doubt that the error relied upon was harmless.

CONCLUSION

The privilege against compulsory self-incrimination does not require an admonition, in lieu of an instruction, on the defendant's failure to testify. Even if an admonition is constitutionally required, under the facts of this case the denial of the requested admonition was harmless error.

Respectfully submitted,

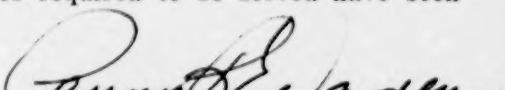
DAVID L. ARMSTRONG
Attorney General

PENNY R. WARREN
Assistant Attorney General

ROBERT L. CHENOWETH
Assistant Deputy Attorney General
121 Capitol Building
Frankfort, Kentucky 40601-3494
(502) 564-7600
Counsel for Respondent

CERTIFICATE OF SERVICE

I, Penny R. Warren, counsel for respondent, hereby certify that the foregoing Brief for Respondent was served on petitioner by personally mailing three copies of the same to counsel for the petitioner, Hon. C. Thomas Hectus, GITTLEMAN & BARBER, 635 West Main Street, Louisville, Kentucky 40202, this 30th day of December, 1983. I further certify that all parties required to be served have been served.



PENNY R. WARREN
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601-3494

ADDENDUM

SUPREME COURT OF KENTUCKY

File No. 82-SC-394-MR

MICHAEL P. JAMES, - - - - - *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, - - - *Appellee.*

BRIEF FOR APPELLANT

ARGUMENT IV

Appellant's Convictions of the Principal Offenses Were Obtained in Violation of Due Process of Law Where the Trial Court Refused to Admonish the Jury Regarding Appellant's Right to Not Testify.

Appellant, by his counsel, requested prior to the instruction of the jury that "an admonition be given to the jury that no emphasis be given to the defendant's failure to testify . . ." [T.E. (Red Volume) p. 4]. Appellant submits that the failure to do so deprived him of due process of law.

The law in this Commonwealth has apparently been to the effect that no comment (even one protective in nature) could be made on defendant's failure to testify. *Green* v. *Commonwealth*, Ky., 488 S. W. 2d 339 (1972), interpreting KRS 421.225; but see *Spencer* v. *Commonwealth*, Ky., 467 S. W. 2d 128 at 130-131 (1971) and *Kelley* v. *Commonwealth*, 300 Ky. 136, 187 S. W. 2d 796, 800 (1945) (holding that the defendant was entitled to instruction upon request; the language in *Spencer* was rejected in *Green, supra,* as "dicta").

However, appellant submits that the requested "admonition"[3] in this case is now constitutonally mandated.

In *Carter* v. *Kentucky*, ____ U. S. ____, 101 S. Ct. 1112, ____ L. Ed. 2d ____ (1981), the United States Supreme Court reviewed a decision of this Court affirming Carter's conviction despite the refusal of the trial court to instruct the jury on Carter's failure to testify. The U. S. Supreme Court reversed, stating that

> The freedom of a defendant in a criminal trial to remain silent 'unless he chooses to speak in the unfettered exercise of his own free will' is guaranteed by the Fifth Amendment and made applicable to state criminal proceedings through the Fourteenth. [cite omitted]. And the Constitution further guarantees that no adverse inferences are to be drawn from the exercise of that privilege. [cite omitted]. Just as adverse comment on a defendant's silence "cuts down on the privilege by making its assertion costly," [cite omitted], the failure to limit the jurors' speculation on the meaning of that silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege. Accordingly, we hold that a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury

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[3]Appellant's trial counsel apparently requested an "admonition" rather than a written instruction. Nonetheless, the constitutional underpinnings are the same, at least in the sense that an admonition is "any authoritative oral communication or statement by way of advice or caution by the court to the jury respecting their duty or conduct as jurors . . . ." Black's Law Dictionary, Revised Fourth Edition, p. 69 (1968) citing *Miller* v. *Noell*, 193 Ky. 659, 237 S. W. 373, 374.

> will give evidentiary weight to a defendant's failure to testify.
>
> [*Id.*, 101 S. Ct. at 1121-1122].

It cannot be assumed that the jury did not notice the appellant's failure to testify, and therefore drew no adverse inference therefrom. The U. S. Supreme Court has labeled such an assumption as "very doubtful . . . speculative . . . [and] dubious. . . ." *Lakeside* v. *Oregon*, 435 U. S. 333, 98 S. Ct. 1091, 55 L. Ed 2d 319 (1978).

Because the trial court refused appellant's timely request for an admonition on his right to not testify, this Court should reverse his conviction and grant him a new trial.

SUPREME COURT OF KENTUCKY

File No. 82-SC-394-MR

MICHAEL P. JAMES, - - - - - - *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, - - - *Appellee.*

BRIEF FOR APPELLEE

ARGUMENT IV

The Trial Court Properly Declined to Give an Admonition Regarding Appellant's Right Not to Testify.

Acknowledging that no *instruction* was requested, appellant relies on *Carter* v. *Kentucky*, 450 U. S. 288, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981), for the proposition that the trial court was required, upon request, to give an *admonition* "that no emphasis be given to the defendant's failure to testify" (TE 426). The Commonwealth respectfully disagrees with appellant's attempt to equate instructions and admonitions and submits that *Carter* is not supportive of appellant's position.

As the Court made clear in *Miller* v. *Noell*, 193 Ky. 659, 237 S. W. 373 (1922), there is a substantial difference between an admonition and an instruction.

> . . . [A]n 'admonition' is any authoritative oral communication or statement by way of advice or caution, made by the court to the jury during the trial of a case, respecting their duty or conduct as jurors, the admissibility or nonadmissibility of evidence offered by the parties, or the purpose, if competent only for a particular purpose, for which any of that admitted

> might or should be considered by them. But by the Civil Code of Practice and the courts of the state *the term 'instructions' has a wholly different legal meaning.* The instructions are from the court and addressed to the jury, and contain the law of the case by which they are to be guided and controlled in arriving at a verdict." *Id.* at 374. (Emphasis added.)

Similarly, in *Carter, supra,* the Court noted " 'the very purpose' of a jury instruction is to direct the jurors' attention to important legal concepts . . ." *Id.*, 450 U. S. at 299. Later in the same Opinion the Court said:

> "No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, *if requested to do so, use the unique power of the jury instruction* to reduce that speculation to a minimum." *Id.*, 450 U. S. at 303. (Emphasis added.)

If appellant had requested the instruction, the court would have been obligated to give a proper instruction. However, appellant may not predicate reversible error on a request for an admonition which was correctly denied by the court.

Should this Court decide the trial judge was nonetheless obligated to instruct the jury that no inference shall be drawn from the defendant's election not to testify, the Commonwealth submits that any error was harmless beyond a reasonable doubt. In *Carter* the Court explicitly left open the issue of whether the failure to give the requested instruction would be harmless under the standard established in *Chapman* v. *California,* 386 U. S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1976). Subsequently, two other states which have considered the issue have found the error harmless. *Richardson* v. *State,* Miss., 402 So. 2d 848, 851-852 (1981); *Parker* v. *Indiana,* Ind., 425 N. E. 2d 628, 630 (1981).

The record in the present case reveals both the prosecutor and defense attorney discussed during voir dire that a defendant is presumed innocent until proven guilty beyond a reasonable doubt and that the burden of proof is on the Commonwealth (TE 143, 165-166). The defense attorney also inquired whether the defendant's failure to testify would create any inference as to innocence or guilt or would cause them to form a decision (TE 167-168). Unlike *Carter, supra,* the prosecutor in his closing comments did not repeatedly argue that the Commonwealth's evidence was "not controverted" or that the defendant's explanation for his conduct was "not in the record." *Id.,* 450 U. S. at 294.

Additionally, the evidence of appellant's guilt was overwhelming. He was positively identified as the perpetrator of the rape. Examination of the victim revealed semen in the vagina, and appellant that night had in his possession two strips of cloth like those used to bind and gag the victim. One strip was knotted and contained saliva of the same blood group as the victim's. Appellant also had in his possession the pistol recently stolen from beneath the victim's pillows. His fingerprint was found on the inside of the storm door bottom panel the day it was forcibly removed and the victim's pillows again disturbed. While appellant did receive the maximum sentence, he may not attribute the severity of his punishment to the failure to give an instruction on his right not to testify. Appellant took the stand in the second phase of the bifurcated proceeding, yet there he also received the maximum sentence. The Commonwealth submits that upon the whole case there is not "a substantial possibility that the result would have been any different." *Abernathy* v. *Commonwealth,* Ky., 439 S. W. 2d 949, 952 (1969). If there were any error, it is harmless beyond a reasonable doubt.

No. 82-6840-CSY
Status: GRANTED

Title: Michael P. James, Petitioner
v.
Kentucky

Docketed:
May 27, 1983

Court: Supreme Court of Kentucky

Counsel for petitioner: Hectus, C. Thomas

Counsel for respondent: Warren, Penny R.

Entry	Date	Note	Proceedings and Orders
1	May 27 1983	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jun 17 1983		Waiver of right of respondent Kentucky to respond filed.
4	Jun 23 1983		DISTRIBUTED. September 26, 1983
5	Jul 14 1983	F	Response requested.
6	Aug 15 1983	X	Brief of respondent Kentucky in opposition filed.
8	Oct 3 1983		REDISTRIBUTED. October 7, 1983
10	Oct 11 1983		REDISTRIBUTED. October 14, 1983
12	Oct 17 1983		Petition GRANTED.
			**********
13	Dec 1 1983		Brief of petitioner Michael P. James filed.
14	Dec 2 1983		Joint appendix filed.
15	Dec 28 1983		Record filed.
16	Dec 28 1983		Certified original record, 8 volumes, received.
17	Dec 31 1983		Brief of respondent Kentucky filed.
18	Jan 9 1984		SET FOR ARGUMENT. Tuesday, February 28, 1984. (3rd case)
19	Jan 11 1984		CIRCULATED.
20	Feb 28 1984		ARGUED.